APAAC SEMINAR: AVOIDING REVERSAL IN SEX CRIMES CASES

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RULE 404(C), INTRINSIC EVIDENCE, & RULE 404(B)

Introduction #1

There are three avenues for admitting uncharged act evidence as substantive evidence of a defendant's guilt under the Arizona Rules of Evidence:

(1) The intrinsic-evidence doctrine, which essentially applies Arizona Rules of Evidence 401 and 402.

(2) Arizona Rule of Evidence 404(b).

(3) Arizona Rule of Evidence 404(c).

Introduction #2

The course outline details each theory's:

- **prerequisites for admissibility**
- **pros and cons**
- **unique dangers for reversal**

The outline also offers concrete, practical solutions that will allow you to offer highly probative evidence of the defendant's uncharged sexual conduct without risking your hard won convictions.

Gettysburg

- http://www.youtube.com/watch?v=iTtv2n9Nrc4

Buford (6:49)

http://www.youtube.com/watch?v=1Hpn-puqnKk

Longstreet & Lee (4:23)

Rule 404(c)'s Text—#1

Rule 404(c)'s prefatory paragraph:

In a criminal case in which a defendant is charged with having committed a sexual offense …, evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged. In such a case, evidence to rebut the proof of other crimes, wrongs, or acts, or an inference therefrom, may also be admitted.

Rule 404(c)'s Text—#2

Rule 404(c)(4)'s definition of "sexual offense":

> As used in this subsection of Rule 404, the term the term "sexual offense" is as defined in A.R.S. Sec. 13-1420(C) and, in addition, includes any offense of first-degree murder pursuant to A.R.S. Sec. 13-1105(A)(2) of which the predicate felony is sexual conduct with a minor under Sec. 13-1405, sexual assault under Sec. 13-1406, or molestation of a child under Sec. 13-1410.

Rule 404(c)'s Text—#3

A.R.S. § 13-1420(C): "'sexual offense' "means any of the following [crimes]":

1. Sexual abuse in violation of § 13-1404.
2. Sexual conduct with a minor in violation of § 13-1405.
3. Sexual assault in violation of § 13-1406.
4. Sexual assault of a spouse if the offense was committed before the effective date of this amendment to this section.
5. Molestation of a child in violation of § 13-1410.

Rule 404(c)'s Text—#4

Continued:

6. Continuous sexual abuse of a child in violation of § 13-1417.

7. Sexual misconduct by a behavioral health professional in violation of § 13-1418.

8. Commercial sexual exploitation of a minor in violation of § 13-3552.

9. Sexual exploitation of a minor in violation of § 13-3553.

Rule 404(c)'s Text—#5

Rule 404(c)(1): "In all such cases, the court shall admit evidence of the other act only if it first finds each of the following: (A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act. …"

N.B. This "sufficient to permit the trier of fact to find" language is similar to Ariz. R. Evid. 104(b) ("sufficient to support a finding that the fact does exist") and Ariz. R. Evid. 901(a) ("sufficient to support a finding that the matter in question is what its proponent claims").

Rule 404(c)'s Text—#6

Comment to the 1997 Amendment to Rule 404 clarifies Rule 404(c)(1)(A) by stating:

"To be admissible in a criminal case, the relevant prior bad act must be shown to have been committed by the defendant by clear and convincing evidence. *State v. Terrazas*, 189 Ariz. 580 (1997)."

Rule 404(c)'s Text—#7

Rule 404(c)(1)(B): "The commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the crime charged."

The Comment to the 1997 Amendment to Rule 404 indicates the ASC's intention to "eliminate" *State v. Treadaway's* requirement "that there be expert testimony in all cases of remote or dissimilar acts."

Rule 404(c)'s Text—#8

Thus, Rule 404(c)(1)(B) permits "the court to admit evidence of remote or dissimilar other acts providing there is a 'reasonable' basis, by way of expert testimony *or otherwise*, to support relevancy, *i.e*., that the commission of the other act permits an inference that defendant had an aberrant sexual propensity that makes it more probable that he or she committed the sexual offense charged ... The present codification of the rule permits admission of evidence of the other act either on the basis of similarity or closeness in time, supporting expert testimony, *or other reasonable basis* that will support such an inference." (1997 Comment; emphasis added.)

Rule 404(c)'s Text—#9

Rule 404(c)(1)(C) states:

"The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403. In making that determination under Rule 403 the court shall also take into consideration the following factors, among others:

Rule 404(c)'s Text—#10

(i) remoteness of the other act;

(ii) similarity or dissimilarity of the other act;

(iii) the strength of the evidence that defendant committed the other act;

(iv) frequency of the other acts;

(v) surrounding circumstances;

(vi) relevant intervening acts;

(vii) other similarities or differences;

(viii) other relevant factors.

Rule 404(c)'s Text—#11

Rule 404(c)(1)(D): "The court shall make specific findings with respect to each of (A), (B), and (C) of Rule 404(c)(1)."

N.B. The trial court's failure to make proper findings under this subsection was the reason for reversals in *Aguilar* and *Ferrero.*

Rule 404(c)'s Text—#12

Rule 404(c)(2): "In all cases in which evidence of another act is admitted pursuant to this subsection, the court shall instruct the jury as to the proper use of such evidence."

Comment: "At a minimum, the court should instruct the jury that the admission of other acts does not lessen the prosecution's burden to prove the defendant's guilt beyond a reasonable doubt, and that the jury may not convict the defendant simply because it finds that he committed the other act or had a character trait that predisposed him to commit the crime charged."

Rule 404(c)'s Text—#13

Rule 404(c)(3): "In all criminal cases in which the state intends to offer evidence of other acts pursuant to this subdivision of Rule 404, the state shall make disclosure to the defendant as to such acts as required by Rule 15.1, Rules of Criminal Procedure, no later than 45 days prior to the final trial setting or at such later time as the court may allow for good cause…."

Rule 404(c)(1)(A)–#1

Rule 404(c)(1)(A)'s "clear and convincing evidence" standard is "more exacting than the standard of preponderance of the evidence, but less exacting than the standard of proof beyond a reasonable doubt," *State v. Renford*, 155 Ariz. 385, 388 (App.1987).

It is satisfied with proof rendering "the truth of the contention … 'highly probable.'" *State v. Roque*, 213 Ariz. 193, 215, ¶ 75 (2006).

Rule 404(c)(1)(A)–#2

The clear and convincing evidence standard for uncharged-act evidence is satisfied by the same quantum of proof necessary to survive a Rule 20 motion (see cases on page 4 of Outline):

"Before evidence of a prior crime may be admitted for purposes of Rule 404(b), there must be sufficient proof of that crime that it could be presented to a jury if the crime was charged. … This means that there must be substantial evidence of each element of the crime charged." *State v. McGann*, 132 Ariz. 296, 298 (1982).

Rule 404(c)(1)(A)–#3

Implications of equating CCE w/ Rule 20:

1. Victim's uncorroborated testimony is alone sufficient, even if impeached.

2. Judges cannot grant DV's based upon personal disbelief of the prosecution witnesses b/c credibility is exclusively a jury question. This rationale applies to uncharged-act evidence.

3. Judges merely assess sufficiency of the evidence.

4. DV's must be denied, even if the defendant presents uncontradicted testimony or calls more witnesses .

Rule 404(c)(1)(A)–#4

Rule 404(c)(1)(A)'s text does not condition admission upon the *judge* finding the State's witnesses credible or being personally convinced that the fact at issue was proven. Instead, the rule requires "the evidence [be] sufficient to permit the trier of fact [the jury] to find that the defendant committed the other act." This formulation parallels Rules 104(b) and 901(a).

Rule 404(c)(1)(A)–#5

The significance of this parallel language is that Arizona courts have held that trial judges may *not* preclude evidence a jury could find true, based upon their own subjective credibility assessments.

Rule 404(b): *Roscoe*, *Williams* & *Romero.*

Hearsay exceptions: *Whitney*, *LaGrand*, *Jeffers*, *Alvarez, Meijas*, etc.

Authentication: *King* (collecting cases); and

Expert testimony: *Logerquist & Plew.*

Rule 404(c)(1)(A)—#6

The “clear and convincing evidence” standard may be satisfied, even if the uncharged-act witness had been repeatedly abused and thus cannot recall specific details about each discrete event.

A trial witness’ inability to recall details formerly within his or her personal knowledge—such as dates, times, words during conversations, etc.—goes to the weight, but not the admissibility, of his or her testimony. (Outline pp.8-9.)

Rule 404(c)(1)(A)–#7

Courts nationwide have upheld *convictions* under the "resident molester" doctrine, despite the lack of detailed memories pertaining to each episode of abuse, provided that the victim can still:

- describe the type of sexual activity,
- estimate how often the defendant victimized her, and
- recall the general time frame.

See Outline pp.9-10.

Rule 404(c)(1)(A)–#8

Clear & convincing evidence standard is met by:

- defendant's prior conviction by jury;
- defendant's guilty or no-contest plea;
- defendant's admissions to others.

No *corpus delicti* requirement for other-act evidence.

Outline pp.10-11.

Rule 404(c)(1)(A)–#9

Unfortunately, the Arizona Supreme Court ignored the principles outlined above and has (wrongly) held in *State v. Aguilar*, 209 Ariz. 40, 49-50, ¶¶ 33-35 (2004), that the trial judge must resolve the conflict between a victim's allegations and the defendant's denials by conducting an evidentiary hearing at which he/she can assess the relative credibility of these witnesses.

Rule 404(c)(1)(A)–#10

The components of *Aguilar's* reversal:

- Court denied severance motion where the defendant was charged with sexually assaulting three different women, but told police they consented to sex.
- The trial court "limited its review to the transcript of the grand jury proceedings, the pleadings, and the arguments of counsel at oral argument."
- "None of these materials contained testimony from the victims; the grand jury transcript contained only a police officer's descriptions of the victims' statements to the police."

Rule 404(c)(1)(A)–#11

Components of reversal in *Aguilar* (cont'd):

- The court "missed the point" by finding CCE because the defendant had admitted that he had sex with the three victims. The actual question, however, was "whether [his] sexual contact was without the victims' consent."

Rule 404(c)(1)(A)–#12

"The resolution of this issue [of consent] turns largely on the credibility of the witnesses. Consequently, the trial court had to make a credibility determination that the victims' accounts of the assaults were more credible than Aguilar's for the court to make the necessary finding that clear and convincing evidence established that the sexual contact in each incident was non-consensual. That could not have occurred here, when the court neither heard from the victims nor was presented with any prior testimony from them."

209 Ariz. at 50, ¶ 35.

Rule 404(c)(1)(A)–#13

Under *Aguilar,* prosecutorial avowals and/or hearsay accounts related by police officers under oath constitute incompetent evidence. Therefore, the State must present the witnesses' first-hand accounts to enable the judge to make the credibility assessment the Arizona Supreme Court mistakenly finds Rule 404(c)(1)(A) to require.

Rule 404(c)(1)(A)–#14

The Arizona Supreme Court compounded its error in *Aguilar* with a harmless-error analysis that confined its review to just the materials and information presented to the trial judge *at the time of his pretrial ruling denying the defendant's severance motion.* Stated differently, the *Aguilar* court ignored the trial evidence and the trial court's denial of the defendant's Rule 20 motions.

Rule 404(c)(1)(A)–#15

Avoiding reversal under *Aguilar*

The safest route (and the one prosecutors and victims will least welcome) is to offer live testimony of percipient witnesses at a pretrial evidentiary hearing, which will enable the judge to make the credibility determination that *Aguilar* requires, despite other authorities recognizing that credibility is exclusively a matter for the jury.

Rule 404(c)(1)(A)–#16

State v. LeBrun, 222 Ariz. 183, 213 P.3d 332 (App.2009), affords the State an avenue for satisfying Rule 404(c)(1)(A)'s requirement without calling its other-act witnesses at a live evidentiary hearing and exposing them to cross-examination.

Rule 404(c)(1)(A)–#17

The *LeBrun* panel could not overrule or disregard *Aguilar*, but instead was bound by the high court's incorrect statement that "the trial court had to make a credibility determination that the victims' accounts of the assaults were more credible than Aguilar's for the court to make the necessary finding that clear and convincing evidence."

Rule 404(c)(1)(A)–#18

The *LeBrun* panel, however, found an escape valve in *Aguilar's* very next sentence: "That [credibility assessment] could not have occurred here, when the court *neither heard from the victims* nor was presented with any prior testimony from them."

The panel concluded that the State allowed Judge McClennan to "hear[] from the victims" by submitting videotapes or audio cassettes of police interviews during which all of its witnesses related their firsthand accounts of the uncharged acts.

Rule 404(c)(1)(A)–#19

LeBrun held that trial judges may determine the admissibility of other-act evidence under Rule 404(c), based upon video or audio recordings of the victim's pretrial interview statements, particularly when, as here, "the trial court gave defendant the opportunity to present evidence disputing the victims' statements, but offered nothing."

222 Ariz. at 185-88, ¶¶ 8, 13, 15-16, 213 P.3d at 334-37.

Rule 404(c)(1)(A)–#20

The *LeBrun* panel concluded that no live evidentiary hearing was required for the required credibility assessment because:

- Neither Rule 404(b) nor Rule 404(c) explicitly requires an evidentiary hearing with live testimony, but Rule 104(a) allows preliminary determinations to be made with information not satisfying evidentiary rules.
- Neither *Aguilar* nor Rule 404(c) categorically restricts the types of evidence the trial court may consider during its pretrial determination.
- By virtue of the State's submitted recordings, "the trial court heard the victims' own statements and first-person accounts of what they observed or perceived regarding the defendant's conduct."

Rule 404(c)(1)(A)–#21

Why "*LeBrun* > *Aguilar*"

- *LeBrun* honors the Arizona constitution's provision preserving the jury's exclusive role in determining witness credibility.
- *LeBrun* is consistent with Rule 20 jurisprudence, Rule 404(c)(1)(A)'s plain text, and precedent holding that judges may not use Arizona's evidentiary rules to bootstrap themselves into the jury box.
- Rule 104(a) allows courts to make preliminary determinations of admissibility based upon hearsay and other information not admissible under the rules of evidence.

Rule 404(c)(1)(A)–#22

Why "*LeBrun* > *Aguilar*" (continued):

- Rule 104(b) allows judges to conditionally admit other-act evidence at trial and prohibits judges from making credibility assessments.
- The overwhelming weight of authority outside Arizona allows courts to determine admissibility of other-act evidence based upon avowals, police reports, and recordings.
- The incongruity between *Aguilar* and the ASC's Rule 404(b) jurisprudence, which requires no pretrial evidentiary hearing and reviews the *trial evidence* to determine the correctness of the judge's admission of other-act evidence.

Rule 404(c)(1)(A)–#23

Other tips to avoid reversal

- ALWAYS submit audio or video recordings of the interview statements of the charged and uncharged-act victims, as well as any other percipient eyewitnesses. If no recordings exist, have your case agent conduct a tape-recorded interview.

- The Victims' Bill of Rights does not entitle victims of uncharged acts to refuse defense interviews. Submit any recordings of defense interviews.

Rule 404(c)(1)(A)–#24

Other tips to avoid reversal

- Submit the defendant's tape-recorded confession or admissions. If the defendant was never interviewed, let the record reflect he never denied the allegations at issue.

- If the defendant was prosecuted for the uncharged-act evidence, you should submit transcripts from that proceeding's pretrial evidentiary hearings or witness interviews, the defendant's admissions at the change-of-plea hearing, and testimony offered at trial and sentencing.

Rule 404(c)(1)(A)–#25

If the judge insists on a live evidentiary hearing, you could consider filing a special action, but be warned: *LeBrun* does not mandate the procedure Judge McClennan followed, but merely upheld his review of the recordings as within his discretion. A special action, however, could give the ASC an opportunity to revisit *Aguilar* pretrial, without the danger of reversing a conviction following a trial.

Rule 404(c)(1)(A)–#26

If the judge insists on a live evidentiary hearing, you could also withdraw your Rule 404(c) theory and pursue admission pursuant to the intrinsic-evidence doctrine and/or Rule 404(b).

Do not rely exclusively on Rule 404(c) when other avenues for admitting other-act evidence exist! Although Arizona appellate courts are duty-bound to affirm a ruling admitting evidence on any basis supported by the record, they have sometimes suggested that the State waives any theories not advanced below.

Rule 404(c)(1)(A)–#27

Consider A.R.S. § 13-1417, the continuous sexual abuse statute, as an alternative when the victim has been molested repeatedly by the defendant, but clearly recalls only a small number of sexual-abuse episodes.

Rule 404(c)(1)(A)–#28

A.R.S. § 13-1417 provides:

A. A person who over a period of three months or more in duration engages in three or more acts in violation of § 13-1405, 13-1406 or 13-1410 with a child who is under fourteen years of age is guilty of continuous sexual abuse of a child.

B. Continuous sexual abuse of a child is a class 2 felony and is punishable pursuant to § 13-705.

C. To convict a person of continuous sexual abuse of a child, the trier of fact shall unanimously agree that the requisite number of acts occurred. The trier of fact does not need to agree on which acts constitute the requisite number.

Rule 404(c)(1)(A)–#29

The appeal of invoking A.R.S. § 13-1417 is that every act the victim recalls at trial will satisfy the ASC's refined definition of intrinsic evidence, as such testimony either "(1) directly proves the charged act, or (2) is performed contemporaneously with and directly facilitates commission of the charged act." *State v. Ferrero*, 229 Ariz. 239, 243, ¶ 20, 274 P.3d 509, 513 (2011).

Rule 404(c)(1)(B)–#1

The Comment to Rule 404(c) indicates that Rule 404(c)(1)(B) eliminated the *Treadaway* requirement that the State offer expert testimony whenever the uncharged-act is either temporally remote or dissimilar. However, the prosecution must still demonstrate by means other than expert testimony that the uncharged act give rise to an inference that the defendant has an aberrant propensity to commit the charged offense.

- http://www.youtube.com/watch?v=86UyxGZ_pgQ
- Niles Crane (5:09)

Rule 404(c)(1)(B)–#2

I strongly recommend that an expert be called to testify in extreme cases, such as when:

(1) The defendant is a non-preferential child molester; OR

(2) Significant age differences in the victims (i.e., an infant or prepubescent girl versus post-pubescent teenagers or adult women); OR

(3) Abuse committed in materially different ways (i.e., non-violent molestation of a child versus forcible rape).

Rule 404(c)(1)(B)–#3

See the outline for cases re:

- Rule 404(c) encompasses sexual assault of members of the opposite sex—*Aguilar* (page 22).
- Sexual conduct with a minor is sexually aberrant (pages 23-24).
- Possession of child pornography demonstrates sexual aberrance (page 24).
- Crimes against the same victim shows the defendant's lewd disposition toward that person (pages 26-28).
- Acts that are not crimes may show aberrance (page 28)

Rule 404(c)(1)(B)–#4

Note that Rule 404(c)'s introductory paragraph allows the defendant to REBUT the State's evidence of his sexual aberrance:

In a criminal case in which a defendant is charged with having committed a sexual offense…, evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged. *In such a case, evidence to rebut the proof of other crimes, wrongs, or acts, or an inference therefrom, may also be admitted*.

Rule 404(c)(1)(B)–#5

- In prosecutions for violations of A.R.S. §13-1405, where the State did not offer evidence under Rule 404(c), the defendant may still offer evidence of his sexual normalcy under *State v. Rhodes*, 219 Ariz. 476, 479-80, ¶ 14, 200 P.3d 973, 976-77 (App.2008).

- In such cases, the defendant may present reputation and opinion testimony based upon lay witnesses' observations of his conduct with children, pursuant to Arizona Rule of Evidence 405(a). *Id.* at 479-80, ¶¶ 11-16, 200 P.3d at 976-77.

Rule 404(c)(1)(B) –#6

- In 13-1405 cases where the State does not offer other-act evidence under Rule 404(c), the defense may not offer testimony regarding specific acts or instances of the defendant's sexually normal conduct pursuant to Rule 405(b).

- Rationale: Rule 405(b) permits proof of specific instances of conduct only in two circumstances:

First, the defendant needs to rebut aberrant-propensity evidence offered by the State. See Rules 404(a)(1), Rule 404(c) and 405(b). NONE was admitted in *Rhodes.*

Rule 404(c)(1)(B) –#7

Second, specific-act evidence is admissible if the character or trait of character is an "essential element" of a charge, claim or defense. "[S]exual deviancy is not an element of the crime of, and sexual normalcy is not an element of the defense to, sexual conduct with a minor." *State v. Rhodes*, 219 Ariz. 476, 480, ¶ 16 (App. 2009).

See A.R.S. § 13–1405 ("A person commits sexual conduct with a minor by intentionally or knowingly engaging in ... oral sexual contact with any person who is under eighteen years of age."); A.R.S. § 13–1407(E) (Supp.2007) (identifying lack of sexual interest as a defense only to charges of sexual abuse (§ 13–1404) and molestation (§ 13–1410)).

Rule 404(c)(1)(B) –#8

Rhodes summary:

- *Opinion and reputation* evidence of sexual normalcy ALWAYS allowed.
- *Specific acts* allowed ONLY if:
  - State offers other-act evidence or justifies consolidated trial under Rule 404(c).
  - The defendant is charged with sexual abuse or child molestation and raises Section 13-1407(E)'s defense he was not motivated by sexual interest.

Rule 404(c)(1)(C)–#1

(c) The evidentiary value of proof of the other act is not substantially outweighed by danger of unfair prejudice, confusion of issues, or other factors mentioned in Rule 403. In making that determination under Rule 403 the court shall also take into consideration the following factors, among others:

(i) remoteness of the other act;

(ii) similarity or dissimilarity of the other act;

(iii) the strength of the evidence that defendant committed the other act;

(iv) frequency of the other acts;

(v) surrounding circumstances;

(vi) relevant intervening acts;

(vii) other similarities or differences;

(viii) other relevant factors.

Rule 404(c)(1)(C)–#2

When the other-act is temporally remote:

- Precedent: remoteness "goes to the weight to be given the testimony by the jury, and not its relevance or admissibility." (Outline, p.29)

- Case law upholding acts up to 40 years old. (Outline, p.30.)

- Intervening sexual acts dissipates remoteness between uncharged and the charged acts. (Outline, p.30.)

Rule 404(c)(1)(C)–#3

When the other-act is temporally remote:

- Age of prior acts ameliorated by defendant's imprisonment, supervised parole status, or other reasons denying him contact with children. Time is effectively tolled. (Outline, pp.30-31.)

- Remoteness is not a concern when defendant's charged and uncharged acts victimized the same person. (Outline p.31.)

Rule 404(c)(1)(C)–#4

When the other-act is temporally remote:

- Remoteness can be ameliorated by demonstrating that the charged and prior acts possess many similarities. (Outline pp.31-32.)

- An uncharged act is not rendered "remote" on the basis the defendant committed it *after* (as opposed to before) the charged offense. (Outline p.32.)

Rule 404(c)(1)(C)–#5

When the other-act is temporally remote:

- Remoteness can be overcome by showing that the defendant is a **generational molester** whose inactivity was attributable solely to the fact that no children visited or lived with him until the charged victim's arrival and coming of age. *See State v. Weatherbee*, 158 Ariz. 303, 304-05 App.1988).

Rule 404(c)(1)(C)–#6

When the other-act is temporally remote:

- A defendant in one of my cases (Solnicka) argued on appeal that his prior molestation was too remote to be admitted because: (1) he did not molest any children during the 10-year period preceding his charged offenses; and (2) his inactivity could not be attributed to his lack of access to young children. Neither circumstance is necessary to overcome remoteness. See cases on pages 32-33 of Outline.

Rule 404(c)(1)(C)–#7

When the uncharged and charged acts have dissimilarities:

- Remind the court that "[a]n exact replication between the charged acts and the uncharged acts is not required to permit the admission of uncharged acts under the emotional propensity exception [because] the [emotional propensity for aberrant acts] exception requires only that the uncharged acts be similar to the charged acts." *State v. Lopez*, 170 Ariz. 112, 117 (App.1991). *Accord State v. Weatherbee*, 158 Ariz. 303, 304 (App.1988) ("Exact similarity between acts is not required.").

Rule 404(c)(1)(C)–#8

When the uncharged and charged acts have dissimilarities, highlight the similarities in age, gender, grooming techniques, the progression of sexual acts culminating in the charged conduct, the victim's appearance and family characteristics, and the types of activities involved.

United States v. Bentley, 475 F.Supp.2d 852, 858 (N.D. Iowa 2007) (collecting cases citing gender, age, and activities as grounds of similarity);

State v. Dixon, 226 Ariz. 545, 550, ¶¶ 15-16 (2011) (defendant selected victims of same age, height, weight, hair and eye color, used knife during rapes, and redressed both victims).

Rule 404(c)(1)(C)–#9

When the uncharged and charged acts have dissimilarities:

- A defendant should not prevail on the basis that his sexual misconduct with one victim was less intrusive than his activities with another, because such differences could be attributable to the victim's level of resistance or prompt disclosure, the proximity of others who could detect the abuse, or the defendant's differing levels of access to the victims. (Outline, p.35.)

Rule 404(c)(1)(C)–#10

When the uncharged and charged acts have dissimilarities:

- Possession of child pornography may be similar to hands-on offenses if the images depicted behavior similar to the defendant's charged conduct with the victim, or if the child pornography depicted minors of the same gender or age as the charged victim. *See Touchton v. State*, 437 S.E.2d 370, 372 (Ga.App.1993).

- Temporal proximity can cure dissimilarity.

Rule 404(c)(1)(C)–#11

Rule 404(c)(1)(c)(iii): Strength of evidence.

- Strongest when defendant has a conviction for the uncharged act, confessed to the misconduct, or was caught in the act by multiple eyewitnesses or videotape.

- Recall that the uncorroborated testimony of the victim is alone sufficient to admit the other act.

Rule 404(c)(1)(C)—#12

Rule 404(c)(1)(c)(iii): Strength of evidence.

- Even without a confession, the State is not completely at loss when the defendant offers inconsistent, incredible, and/or demonstrably false statements about the other act. Still very probative circumstantial evidence of his guilt. *See State v. Fulminante*, 193 Ariz. 485, 494, ¶ 27 (1999) ("Defendant made several false, misleading, and inconsistent statements to police, other witnesses, and his wife—showing consciousness of guilt"). Other cases appear on pp.36-37 of Outline.

Rule 404(c)(1)(C)–#13

Rule 404(c)(1)(c)(iv): frequency.

- Lack of frequency can be offset by other factors, such as temporal proximity, similarity, the strength of evidence supporting the other act, or proof that the defendant was in custody or otherwise lacked unsupervised access to children.

- Nonetheless, *Dixon* and *Vega* demonstrate that the uncharged act is admissible, even if it is the only one known.

Rule 404(c)(1)(C)–#14

Rule 404(c)(1)(c)(v-viii): Surrounding circumstances, relevant intervening acts, other similarities or differences, and other relevant factors.

Given the overlap with the factors listed above (remoteness, similarity, strength of evidence, and frequency), these four factors have drawn scant, if any, independent treatment by the judiciary.

Rule 404(c)(1)(C)—#15

Prosecutors could pigeonhole the following common facts into one of these latter four subcategories:

- The defendant's close relationship—familial, pastoral, professional, sports, friendship—with the victim or his/her parents.

- The dynamics of the victim's domestic life, including those that would make him/her vulnerable to abuse or less likely to disclose the abuse promptly—alcoholic/absent father, drug-addicted or financially dependent mother, domestic violence, siblings also abused.

- The defendant's lack of access to children, whether due to military service, imprisonment, work-related travel, the proximity of others during contacts with children, etc.

Rule 404(c)(1)(D)–#1

Text: “The court shall make *specific* findings with respect to each of (A), (B), and (C) of Rule 404(c)(1).”

In *Aguilar*, the judge simply parroted the language of Rule 404(c) without explicating the reasons for finding Rule 404(c)(1)(A), (B), and (C) satisfied.

Rule 404(c)(1)(D)–#2

The rationale for Rule 404(c)(1)(D)'s specific-findings requirement is two-fold:

(1) "helps focus the trial court's discretion so that only truly relevant other acts are admitted," and

(2) "enables an appellate court to effectively examine the basis for the trial judge's decision to admit other act evidence under Rule 404(c)."

Aguilar, 209 Ariz. at 49, ¶ 32 (2004).

Rule 404(c)(1)(D)–#3

The Arizona Supreme Court reversed convictions in three cases, based partly or entirely upon the trial judge's non-compliance with Rule 404(c)(1)(D):

- *State v. Ferrero*, 229 Ariz. 239 (2012).
- *State v. Aguilar*, 209 Ariz. 40 (2004).
- *State v. Prion*, 203 Ariz. 157, 164, ¶ 43 (2002) ("sexual propensity evidence under Evidence Rule 404(c) ... cannot be admitted, much less argued, without specific findings").

COA in *State v. Garcia*, 200 Ariz. 471 (App.2001).

Rule 404(c)(1)(D)–#4

The court of appeals, however, has subjected the trial court's failure to make the appropriate findings to harmless-error review, and several cases have deviated from *Aguilar* by considering the evidence the State actually offered *at trial.*

However, these cases are lower-court decisions that either *distinguished* *Aguilar* or *predated* it.

Rule 404(c)(1)(D)–#5

State v. Vega, 228 Ariz. 24, 28-30, ¶¶ 17-24 (App.2011), considered the entire trial record while determining whether the improper admission of an uncharged act without Rule 404(c) screening constituted harmless error because:

(1) the erroneous ruling did not concern the joinder/severance of counts and therefore did not determine entire course of trial;

(2) even without the beach incident, the jury would hear both victims (defendant's nieces) testify about the charged acts; and

(3) unlike *Aguilar*, the trial court properly instructed jury that it "may" consider the evidence "only if" the state proved by clear and convincing evidence that defendant committed the act and the act showed predisposition to commit abnormal or unnatural sexual acts.

Rule 404(c)(1)(D)–#6

State v. Marshall, 197 Ariz. 496, 499-501, ¶¶ 7-14 (App.2000), is a *pre-Aguilar* case that:

- found the superior court's failure to make Rule 404(c)(1)(D)'s specific findings while denying a severance motion "was at most harmless error," because the videotape footage of the sexual offenses conclusively satisfied the rule's conditions for admissibility.

Rule 404(c)(1)(D)–#7

- *Marshall also* upheld the denial of mistrial motion triggered by the victim unexpectedly testifying that the defendant penetrated her digitally and with his penis penetration while answering the prosecutor's questions about the charged episode involving oral sex by both parties. The Court noted this evidence would have been admissible under Rule 404(c) or as intrinsic evidence.

Rule 404(c)(1)(D)–#8

State v. Herrera, 232 Ariz. 536 (App.2013):

- Remanded because the ASC vacated the Arizona Court of Appeals' original holding that the uncharged act evidence was intrinsic and remanded in light of *State v. Ferrero*, 229 Ariz. 239 (2012).

- Thetrial judge made a post-verdict determination, based on the victim's testimony and other trial evidence, that the uncharged act evidence at issue satisfied Rule 404(c)'s prerequisites.

- The COA implicitly found the trial judge's failure to make these Rule 404(c)(1)(D) findings before trial non-prejudicial and affirmed under the right result/wrong reason doctrine. 232 Ariz. at 545, ¶ 21.

Rule 404(c)(1)(D)–#9

In another case, the court of appeals did not attempt to cure the lack of Rule 404(c) screening by reviewing the evidence adduced at trial, but instead engaged in traditional harmless-error analysis to determine whether the jury would have still convicted the defendant, even without exposure to the other-act evidence at issue.

See State v. Garcia, 200 Ariz. 471, 478-79, ¶¶ 41-45 (App.2001) (finding harmless error only for those verdicts supported by physical injuries that corroborated the victim's testimony, and noting that the jury demonstrated lack of prejudice by acquitting the accused on other counts).

Rule 404(c)(1)(D)–#10

Recommendations to avoid reversal:

(1) Keep a good record for the appellate court.

- Remember that unrecorded bench conferences and discussions in chambers without court reporters are not part of the appellate record. Thus, findings made off the record will not satisfy Rule 404(c)(1)(D). Nor will you be saved by defense counsel conceding at an unrecorded bench conference that Rule 404(c)'s prerequisites are satisfied. The latter omission doomed the State in *Ferrero.*

- Memorialize all off-the-record findings, concessions, etc. during a later proceeding, while the court reporter is taking notes.

Rule 404(c)(1)(D)–#11

Recommendations to avoid reversal:

(2) Submit written proposed findings of fact and law with your motion in limine. The time-pressed judge will have the opportunity to adopt your findings in whole or in part and incorporate them by reference. The appellate record will also show that the judge had these relevant facts before him/her at the time of ruling.

Rule 404(c)(1)(D)–#12

Recommendations to avoid reversal:

(3) Do not rely exclusively upon Rule 404(c), but instead invoke every applicable Rule 404(b) exception. Why?

- Appellate courts must affirm on any ground supported by the record, but still suggest the State waived theories not raised below.

- This option allows you to withdraw Rule 404(c) and have the jury instructed solely on Rule 404(b). [*Ferrero* horror story.]

Rule 404(c)(1)(D)–#13

Recommendations to avoid reversal:

(4) If the judge's findings are deficient in some respect, move for clarification to cure the omission.

- Recite Rule 404(c)(1)(D)'s text: "The court shall make specific findings with respect to each of (A), (B), and (C) of Rule 404(c)(1)." "Shall" connotes a mandatory obligation.

- Note Rule 404(c)(1)(D) requires "specific" finding "with respect to each of (A), (B), and (C)," and quote the pertinent passage from *Aguilar.*

Rule 404(c)(1)(D)–#14

What to do if the judge refuses to make the requisite findings?

(1) Consider proceeding under Rule 404(b).
(2) Special action petition w/ COA.
(3) File a petition for writ of mandamus in the ASC to force the judge to perform the mandatory duty imposed by Rule 404(c)(1)(D).

Rule 404(c)(2)–#1

Limiting instruction is mandatory under Rule 404(c)(2): "In ***all cases*** in which evidence of another act is admitted pursuant to this subsection, the court shall instruct the jury as to the proper use of such evidence." (Emphasis added.)

See also State v. Aguilar, 209 Ariz. 40, 49 n.11 (2004) ("If the superior court should admit evidence of other acts under Rule 404(c), it *must* 'instruct the jury as to the proper use of such evidence.'") (emphasis added).

Distinguishable from Rule 404(b), where instruction is required only upon the defendant's request. If not requested, its absence is NOT fundamental error. *See Nordstrom*, *Roscoe*, and *Miles.*

Rule 404(c)(2)–#2

What if the judge forgets the instruction and you do not realize the omission? Proposal:

Make it your standard practice to incorporate the essence of the jury instruction during your opening statement and closing arguments, while you are explaining the reasons for admitting the uncharged-act evidence.

Rule 404(c)(2)–#3

You should tell the jury:

(a) the evidence is being offered only to prove that the defendant has an aberrant propensity to commit the charged offenses;

(b) the jury needs to find that by clear and convincing evidence, the defendant committed the other acts, and that these acts demonstrate that he has an aberrant sexual propensity; and

(c) even if the jury finds that he committed the other acts and has the character trait of sexual aberrance, the jurors must still unanimously find beyond a reasonable doubt that he committed the charged acts.

Rule 404(c)(2)–#4

Why discuss the instruction during closing?

A: Defective jury instructions may be cured or rendered less prejudicial by closing arguments.

See State v. Lehr, 227 Ariz. 140, 148, ¶ 24, (2011) ("Here, the purposes for which the evidence was admitted were apparent from the record. In closing arguments, the State urged the jury to consider the evidence only for the original purposes for which it had been offered: to show modus operandi, identity, and an aberrant sexual propensity.");

State v. Valverde, 220 Ariz. 582, 586, ¶ 16 (2009) ("In assessing the impact of an erroneous instruction, we also consider the attorneys' statements to the jury."). See also Outline, p.43.

Rule 404(c)(2)–#5

Why discuss the instruction during closing?

A: By discussing this instruction, the chances increase that you, the court, defense counsel, the jurors, your co-counsel or case agent, or some other third party might realize that the limiting instruction has been omitted before or during the jury's deliberations.

Rule 404(c)(2)–#6

Make sure that the limiting instruction is correct.

If correct, the State can defend the admission of this evidence against Rule 403 attack or establish harmless error by arguing that jurors are presumed to follow the court's instructions.

If incorrect, other Rule 404(c) errors will be compounded and no harmless error will be found. *See Aguilar*, 209 Ariz. at 50 n.12.

Rule 404(c)(3)–#1

Disclosure obligations in Rule 404(c)(2):

"In all criminal cases in which the state intends to offer evidence of other acts pursuant to this subdivision of Rule 404, the state shall make disclosure to the defendant as to such acts as required by Rule 15.1, Rules of Criminal Procedure, no later than 45 days prior to the final trial setting or at such later time as the court may allow for good cause."

Rule 404(c)(3)–#2

Make sure that your disclosure notice or motion in limine specifies the uncharged acts or visual depictions that you will offer at trial. Besides helping you avoid litigating the late disclosure of other-act evidence, you accomplish the following:

- Timely disclosure and specification increases the likelihood that the court will screen every uncharged act you ultimately offer at trial.

Rule 404(c)(3)–#3

- NOTICE: Timely disclosure will help you avoid reversal on the ground that the defendant lacked sufficient opportunity to marshal rebuttal evidence. *See State v. Vega*, 228 Ariz. 24, 30, ¶ 28 n.5 (App.2011).

- Specification of the uncharged-acts will help you avoid creating the problem of a "duplicitous charge," which occurs when the indictment alleges the commission of just one act, but the State's trial evidence shows that the defendant committed the charged offense multiple times. [Curtis]

Lee & Longstreet Day 3

- http://www.youtube.com/watch?v=_GOhMhedJbA

Lee & Longstreet – Day 3 (2:41)

Intrinsic-evidence doctrine—#1

The intrinsic evidence doctrine is best understood as application of the concept of relevance embodied in Arizona Rules of Evidence 401 and 402 and subject only to Rule 403's provision excluding evidence whose probative value is substantially outweighed by the risk of unfair prejudice.

Intrinsic-evidence doctrine—#2

"Its premise is that certain acts are so closely related to the charged act that they cannot fairly be considered 'other' acts, but rather are part of the charged act itself." *State v. Ferrero*, 229 Ariz. 239, 242, ¶ 14 (2012) (citing *United States v. Green*, 617 F.3d 233, 245 (3rd Cir. 2010)).

"The doctrine recognizes that excluding evidence of these acts may prevent a witness from explaining the charged act, making the witness's testimony confusing or incoherent." *Id.*

Intrinsic-evidence doctrine—#3

This doctrine is very alluring to prosecutors because intrinsic evidence is not subject to the special requirements of Rule 404(b) or Rule 404(c).

Intrinsic-evidence doctrine—#4

Until 2012, the Arizona Supreme Court adhered to the following formulation of this doctrine:

"'Other act' evidence is 'intrinsic' when evidence of the other act and evidence of the crime charged are 'inextricably intertwined' or both acts are part of a 'single criminal episode' or the other acts were 'necessary preliminaries' to the crime charged."

State v. Dickens, 187 Ariz. 1, 18 n.7 (1996).

Intrinsic-evidence doctrine—#5

The Arizona Supreme Court repudiated this tripartite standard because of the difficulty of determining "when an 'other act' is necessarily preliminary to the charged act, or when evidence crosses the line from being admissible as 'part of a single criminal episode' as the charged act, to being inadmissible as merely arising 'out of the same series of transactions as the charged offense.'" *State v. Ferrero*, 229 Ariz. 239, ¶ 18 (2012).

Intrinsic-evidence doctrine—#6

The Arizona Supreme Court decided to "reserve the 'intrinsic' label for two narrow categories of [other-act] evidence," specifically that which:

(1) directly proves the charged offense," or

(2) "is 'performed contemporaneously with' and 'facilitate[s] the commission of the charged crime.'"

State v. Ferrero, 229 Ariz. 239, ¶ 19 (2012) (quoting *United States v. Green*, 617 F.3d 233, 248-49 (3rd Cir. 2010)).

Intrinsic-evidence doctrine—#7

Continued: “The intrinsic evidence doctrine thus may not be invoked merely to ‘complete the story’ or because evidence ‘arises out of the same transaction or course of events’ as the charged act.”

[FN4: Evidence that “completes the story,” “arises out of the same transaction” as the charged act, or is “part and parcel” of the charged act may well qualify as intrinsic evidence, but those tests are broader than our formulation and should not be invoked to analyze whether evidence is intrinsic to the charged act.]

Intrinsic-evidence doctrine—#8

The ASC signaled openness to repudiating this doctrine altogether by stating:

"Other jurisdictions have entirely abandoned the intrinsic evidence doctrine. [Citations omitted.] Although the need for the doctrine may be questioned, the parties have not asked that we abandon it, so we do not decide that issue today."

State v. Ferrero, 229 Ariz. 239, 243, ¶ 20 n.3 (2012).

Intrinsic-evidence doctrine—#9

The Arizona Supreme Court's application of the new intrinsic-evidence standard demonstrates that *very few* uncharged acts will qualify as conduct that either "directly proves the charged act" or "is performed contemporaneously with and directly facilitates commission of the charged act."

Intrinsic-evidence doctrine—#10

"For example, the trial court, presumably relying on *Garner*, permitted the prosecutor to introduce evidence that on the ride to Ferrero's house on the night of the first charged offense, Ferrero told the victim to pull down the victim's pants and underwear and expose himself. The victim acceded to Ferrero's demands because Ferrero threatened to leave him on the side of the road if he did not comply. When they arrived at Ferrero's house, the victim talked with Ferrero's mother and played computer games for at least thirty minutes while Ferrero showered. The victim then joined Ferrero in bed, at which time Ferrero completed the first charged act. …

Intrinsic-evidence doctrine—#11

"The evidence of this uncharged act does not fit within our narrow definition of intrinsic evidence. The two acts were qualitatively different and constituted two separate instances of sexual abuse. Thus, under the first prong of our definition, forcing the victim to expose himself *does not directly prove* that Ferrero later committed the charged sexual offense.

Intrinsic-evidence doctrine—#12

The second prong—which requires that the act occur contemporaneously with and directly facilitate the charged act—is equally unavailing. Although forcing the victim to pull down his pants in the vehicle may have facilitated the charged act by weakening the victim's defenses, it did not occur contemporaneously with the charged act. The acts were separated by at least thirty minutes, during which time the victim talked to Ferrero's mother and played computer games." 229 Ariz. at 245, ¶¶ 25, 27.

Intrinsic-evidence doctrine—#13

Ferrero, 229 Ariz. at 244, ¶ 23: HINT—GO TO 404(B):

Our narrow definition of intrinsic evidence will not unduly preclude relevant evidence of a defendant's other acts. Non-intrinsic evidence will often be admissible for non-propensity purposes under Rule 404(b). *See Andriano*, 215 Ariz. at 502-03, ¶¶ 22-23, 26-27 (finding evidence of attempts to procure insurance and extramarital affairs not intrinsic, but nonetheless admissible under Rule 404(b) to show plan, knowledge, motive, and intent to kill).

Intrinsic-evidence doctrine—#14

Thus, *Ferrero/Green* is satisfied when the defendant commits the uncharged and charged acts in the same location and during the uninterrupted course of the same episode of abuse. *See State v. Marshall,* 197 Ariz. 496, 500-01, ¶¶ 8, 13 (App.2000). Illustrations:

- The defendant committed charged hands-on offenses, like sexual abuse, child molestation, or sexual conduct with a minor, while he had the victim sit on his lap to view uncharged images of child pornography on his computer or while he was reading incestuous literature to the victim.

Intrinsic-evidence doctrine—#15

The “directly proves the charged act” prong of *Ferrero* may be satisfied when the uncharged act establishes an element :

- *State v. Salamanca*, 233 Ariz. 292 (App.2013): drunk vehicular-homicide defendant sent an angry text message 59 seconds before 911 call reporting fatal crash. Text message sent 2.25 minutes earlier not intrinsic, but admissible under 404(b) to prove extreme recklessness.

- *United States v. Diaz*, 176 F.3d 52, 79 (2nd Cir. 1999): “An act that is alleged to have been done in furtherance of the alleged conspiracy ... is not an ‘other’ act within the meaning of Rule 404(b); rather, it is part of the very act charged.”

Intrinsic-evidence doctrine—#16

- *United States v. Daly*, 974 F.2d 1215, 1217 (9th Cir. 1992): defendant's possession of a firearm as a felon was established by his uncharged shootout with the police.

- *State v. Baldenegro*, 188 Ariz. 10, 15-16 (App.1996): upholding admission of crimes committed by defendant's fellow gang members as "intrinsic" to the charged offenses of assisting and participating in a criminal syndicate because such criminal acts proved the element that the gang to which defendant belonged was a criminal street gang.

Intrinsic-evidence doctrine—#17

The rationales underlying these cases would apply with equal force when the defendant is charged with continuing sexual abuse under A.R.S. § 13-1417 because every act of sexual assault, sexual conduct with a minor, or molestation would constitute direct proof of the offense.

http://www.youtube.com/watch?v=Vltq8wwWhA4 (Map)

Intrinsic-evidence doctrine—#18

A. A person who over a period of three months or more in duration engages in *three or more acts* in violation of § 13-1405, 13-1406 or 13-1410 with a child who is under fourteen years of age is guilty of continuous sexual abuse of a child. …

C. To convict a person of continuous sexual abuse of a child, the trier of fact *shall unanimously agree that the requisite number of acts occurred*. *The trier of fact does not need to agree on which acts constitute the requisite number*.

A.R.S. § 13-1417 (emphasis added).

Intrinsic-evidence doctrine—#19

We can turn *Ferrero* to our advantage by resorting to Rule 404(b) and noting the Arizona Supreme Court's observation that "most, if not all, other crimes evidence currently admitted outside the framework of Rule 404(b) as 'background' evidence will remain admissible under the approach we adopt today." 229 Ariz. at 244, ¶ 23. Thus, we turn to the non-character purposes for admitting uncharged-act evidence under Rule 404(b).

Desperation leads to good tactics

- http://www.youtube.com/watch?v=VJphvfkDde0 Little Round Top (5:29)

Rule 404(b)–#1

Text of Arizona Rule of Evidence 404(b):

Except as provided in Rule 404(c) evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Rule 404(b)—#2

- Rule 404(b)'s list of non-character purposes is merely illustrative. *State v. Wood*, 180 Ariz. 53, 62, 881 P.2d 1158, 1167 (1994).

- Uncharged acts committed after the charged offenses are admissible under this rule—not just prior acts. *See State v. Hargrave*, 225 Ariz. 1, 8, ¶ 10, 234 P.3d 569, 576 (2010).

Rule 404(b)–#3

"The question under Rule 404(b) is not whether evidence tends to establish guilt but how it tends to establish it. If it tends to show a disposition toward criminality from which guilt on this occasion is to be inferred, it is inadmissible. If it establishes guilt in some other way, it is admissible." *State v. Ramirez-Enriquez*, 153 Ariz. 431, 432 (App.1987).

Rule 404(b)–#4

The proponent must establish by clear and convincing evidence that the defendant committed the act …, and the court must then:

"(1) find that the act is offered for a proper purpose under Rule 404(b);

(2) find that the prior act is relevant to prove that purpose;

(3) find that any probative value is not substantially outweighed by unfair prejudice; and

(4) give upon request an appropriate limiting instruction."

State v. Hargrave, 225 Ariz. 1, 8, ¶ 10 (2010) (quoting *State v. Anthony*, 218 Ariz. 439, 444, ¶ 33 (2008)).

Rule 404(b)—#5

- Thus, "if evidence is relevant for any purpose other than that of showing the defendant's criminal propensities, it is admissible even though it refers to his prior bad acts." *State v. Jeffers*, 135 Ariz. 404, 417 (1983).
- Other-act evidence is not inadmissible because it is alone insufficient to prove the defendant committed the charged offense. (Outline p.55.)

Rule 404(b)—#6

An important caveat: Do NOT PARROT Rule 404(b) and broadly claim that the other-act evidence is admissible to prove the defendant's "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Instead, be specific and explain how the other-act evidence will help you prove a contested element of the crime or rebut the defendant's noticed trial defenses.

Rule 404(b)—#7

Articulating the applicable Rule 404(b) exceptions is important because *State v. Ives*, 187 Ariz. 102, 109-10 (1997), precludes the State from offering other-act evidence to prove the defendant's intent, knowledge, or absence of mistake or accident when the defendant completely denies performing the conduct underlying the offense:

"Unless there is some discernible issue as to defendant's intent (beyond the fact that the crime charged requires specific intent), the state may not introduce evidence of prior bad acts as part of some generalized need to prove intent in every case."

Rule 404(b)—#8

- Conversely stated, the *Ives* rule allows the State to offer other-act evidence to prove intent, knowledge, or absence of mistake or accident when the admits performing the *actus reus* of the charged offense, but claims that his sexual contact with the victim was without criminal intent.

Rule 404(b)—#9

Advantages to specifying 404(b) theories:

(1) On appeal, the AGO won't be forced to defend the admission of other-act evidence on a theory not advanced below.

(2) Articulating the 404(b) exception before or during trial helps ensure that the limiting instruction given to the jury includes that theory.

Rule 404(b)—#10

Advantages to specifying 404(b) theories:

(3) Make the defendant show his hand—your motion in limine identifying specific theories for admitting other-act evidence under Rule 404(b) will force the defendant finally to disclose his trial defenses and witnesses—information that defendants often delay disclosing until shortly before trial.

Rule 404(b)—#11

Advantages to specifying 404(b) theories:

(4) If the defendant shifts course during trial and presents a mental-state defense, you can argue that intent is now at issue, and that he has opened the door to previously precluded evidence. *See State v. Kemp*, 185 Ariz. 52, 60-61 (1996); *State v. Martinez*, 127 Ariz. 444, 447 (1980).

Rule 404(b)–#12

How do defendants open the door to otherwise inadmissible other-act evidence?

- Self-serving statements during police interviews.
- Defense counsel's opening statement.
- Questions asked by defense counsel during cross-examination of the State's witnesses.
- Evidence the defendant offers in his own case. (See cases in Outline, pp.57-58.)

Rule 404(b)–#13

One of the most probative and defensible rationales for admitting other-act evidence is that the State needs it to rebut trial defenses or assertions made by the defendant or his lawyer at trial. *E.g., State v. Jeffers*, 135 Ariz. 404, 419 (1983) ("Furthermore, Jeffers professed a deep abiding love for Penny which would not allow him to cause her any harm. The opening statement for the defense made several references to this love Jeffers had for Penny. Thus, evidence of this prior incident would also be admissible to rebut Jeffers' claim of inability to harm his loved one.").

Other examples appear at Outline pp.59-60.

Rule 404(b)–#14

I. Rule 404(b)'s preparation and plan exceptions:

(1) Avenue for admitting uncharged acts of "grooming," which courts have defined as "the process of cultivating trust with a victim and gradually introducing sexual behaviors until reaching the point" that the defendant can perpetrate a sex crime against his prey. *United States v. Johnson*, 132 F.3d 1279, 1283 n.2 (9th Cir. 1997).

Rule 404(b)–#15

Permissible uses of the preparation and plan exceptions:

Arizona*: State v. Grainge*, 186 Ariz. 55, 58 (App.1996) , held that the State could offer evidence that the defendant groomed his victim with marijuana to lower his resistance to sexual abuse.

Rule 404(b)–#16

Permissible uses of the preparation and plan exceptions. Other jurisdictions, however, go beyond plying the victims with drugs or alcohol and admit evidence that the defendant:

(1) held the victim's hand;
(2) massaged the victim or received a massage from the victim;
(3) exposed the victim to pornography, incestuous literature, sex toys, or lewd comments; and
(4) touched the victim's thigh or breasts to desensitize her to his touch.

Rule 404(b)—#17

Permissible uses of the preparation and plan exceptions:

An important caveat: To the extent that you argue that the grooming (or other sexual other-act evidence) constitutes part of the defendant's common plan or scheme, be mindful that the Arizona Supreme Court requires a showing that these uncharged acts were part of a "particular plan of which the charged crime is a part," and that the plan exception will not be satisfied upon a "mere similarity" or "a visual connection" between the charged and uncharged acts:

Rule 404(b)—#18

Common scheme or plan" as used in Rule 13.3(a)(3), Arizona Rules of Criminal Procedure, and as referenced in Rule 404(b), Arizona Rules of Evidence, must be a "particular plan of which the charged crime is a part." [*State v.*] *Ives*, 187 Ariz. [102,] 108, 927 P.2d [762,] 768 [(1997)] (quoting *State v. Ramirez Enriquez*, 153 Ariz. 431, 432–33, 737 P.2d 407, 408–09 (App.1987)). In *Ives*, this court held that "the inquiry should hereafter focus on whether the acts are part of an over-arching criminal plan, and not on whether the acts are merely similar." Id. at 109, 927 P.2d at 769.

State v. Lee, 189 Ariz. 590, 598, 944 P.2d 1204, 1212 (1997).

Rule 404(b)—#19

Compare State v. Hausner, 230 Ariz. 60, 74, ¶ 47, 280 P.3d 604, 618 (2012):

"Here, in contrast to Lee, the State presented evidence showing that Hausner's crimes were part of an over-arching criminal plan. A forensic psychiatrist testified that, after reviewing information about the crimes, he concluded that this scheme was 'the seeking of thrills or excitement or relief of boredom or relief of negative feelings.' Such a scheme could include even the killing of animals because, as the psychiatrist testified, '[w]ith respect to trying to make one's self feel better through violence, I think it makes no difference whether the targeted victim is a human or some other animal.' Two detectives also testified about similarities among the various shootings."

Rule 404(b)—#20

Recommendations to avoid any issues with the plan exception:

(1) stand exclusively on the preparation exception, which avoids implicating any carryover effect from *Ives* on Rule 404(b)'s plan exception; or

(2) show that escalating acts of grooming behavior was part of the same overarching plan to reduce the child's resistance to the commission of the charged offense. If you intend to offer the testimony of an uncharged victim whom the defendant had groomed in similar fashion, it is important to show that the defendant used the same plan in both instances.

Rule 404(b)—#20A

The plan exception may also be reasonably applied in cases in which the other-act is the defendant's possession of child pornography depicts strikingly unusual sexual activity that he replicated while sexually abusing the charged victim.

This scenario presented itself in an unpublished case I had (*State v. David Garcia*), wherein the defendant had his two minor daughters reenact an uncharged pornographic image depicting a supine young child lying upside-down with her head dangling over the foot of the bed and performing oral sex on a man who stood at the foot of the bed.

Rule 404(b)—#20B

Supporting cases:

Dressler v. McCaughtry, 238 F.3d 908, 914 (7th Cir. 2001) (defendant's possession of videos depicting violent homosexual acts resulting in death and mutilation was "undeniably probative of a motive, intent, or plan to commit a vicious murder").

United States v. Lips, 22 M.J. 679, 682 (A.F.C.M.R. 1986) ("The seized sexually-oriented material also tends to establish preparation for the charged offenses in the sense that he had photographic depictions available suggesting the activity in which he wished to participate.").

Rule 404(b)–#20C

Supporting cases:

Dickerson v. State, 697 S.E.2d 874, 876 (Ga.App.2010) (upholding joinder of charges of child-pornography and sexual-battery against a minor because "some of the photographic images depicted the same acts," which showed "a common motive, plan, scheme, or bent of mind pattern").

Commonwealth v. Scott, 564 N.E.2d 370, 376 n.9 (Mass.1990) (evidence defendant possessed "a magazine article about the serial killer who gagged and strangled young women" was properly admitted as "evidence of modus operandi" because "the way in which the serial killer murdered his victims, and the way in which the victim in the instant case died, were sufficient similar … to be admitted as evidence of sexual desire and contemplation of modus operandi").

Rule 404(b)–#20D

Stated differently, the jury could properly draw the inference that this unique image encouraged or influenced to commit the crimes with the victims alleged in the way he did.

See Turner v. State, 392 S.E.2d 256, 258 (Ga.App.1990) (same holding for rape defendant's possession of a "sex and violence" video which he reenacted with victim);

Commonwealth v. O'Brien, 736 N.E.2d 841, 852 (Mass.2000) (newspaper article about "Natural Born Killers" found in defendant's possession was "probative as to the defendant's state of mind").

Rule 404(b)–#21

II. Corroboration: an unlisted Rule 404(b) exception:

"'Evidence which tests, sustains, or impeaches the credibility or character of a witness is generally admissible,' even if it refers to a defendant's prior bad acts." *State v. Williams*, 183 Ariz. 368, 376 (1995) (quoting *State v. Jeffers*, 135 Ariz. 404, 417 (1983)) (Defendant's violent acts explained why witnesses lied to police)

State v. Cook, 150 Ariz. 470, 472 (1986) (subsequent shooting corroborated victim's testimony defendant threatened to kill his father)

State v. Mosley, 119 Ariz. 393, 401 (1978) (discovery of rifle in drug-laden truck corroborated surveillance officer's testimony he saw defendant load trunk).

Rule 404(b)–#22

Corroboration is also recognized as an exception to Rule 404(b) by *United States v. Green*, 617 F.3d 233, 251 (3rd Cir. 2010), the case that *Ferrero* cited for the proposition that the exclusion of other-act testimony under the intrinsic-evidence doctrine would have little practical effect because it would be admissible pursuant to Rule 404(b).

See Outline pages 65-66 for federal cases.

Rule 404(b)–#23

Corroboration: Arizona sex-crime cases

- *State v. Ramsey*, 211 Ariz. 529, 539-40, ¶¶ 31, 34 (App.2005) (incestuous pornography, lubricant, and vibrator found in defendant's possession were "probative of [his victim-daughter's] credibility and supported her testimony that [defendant] had read one of the stories to her").

- *State v. Lindsey*, 149 Ariz. 493, 498 (App.1985) (defendant's nude photographs of former wife were admissible to corroborate molestation victim's testimony defendant took nude pictures of her).

- See Outline pp.66-67 for cases from other states.

Rule 404(b)—#24

III. Rule 404(b): Other acts may be offered to demonstrate the existence and nature of the defendant's relationship with another person significant to the case—whether as an accomplice or the victim.

Arizona cases deal with accomplices. *See State v. Cruz*, 137 Ariz. 541 (1983); *State v. Wilson*, 134 Ariz. 551 (App.1982).

Rule 404(b)—#25

"The existence of prior sexual abuse involving the same alleged perpetrator and victim … has relevance on the underlying criminal charge because it shows the nature of the relationship between the alleged perpetrator and the victim." *State v. Reyes*, 744 N.W.2d 95, 102 (Iowa 2008).

The relationship rationale is invoked as an exception to Rule 404(b) in sex cases to enhance the credibility of the victim, based upon the rationale that limiting the victim's testimony to the charged offense and prohibiting mention of the antecedent acts "would seriously undermine her credibility in the eyes of the jury." *People v. Dobek*, 732 N.W.2d 546, 568 (Mich.App.2007).

Rule 404(b)—#26

Some illustrative cases (Outline, pp.67-68):

- *Covington v. State*, 703 P.2d 436, 441 (Alaska App. 1985) (“The court accepted two closely related rationales: first, the evidence tended to establish the ongoing relationship between the accused and the victim and explained, in part, the victim's inability to specifically describe separate incidents; and, secondly, it served to explain the victim's testimony in its context, particularly indicating why she might acquiesce in the defendant's demands.”).

- *Caccavallo v. State*, 436 N.E.2d 775, 776-77 (Ind.1982) (defendant’s sexually-explicit photographs of victim demonstrated “the existence of an intimate sexual relationship between the accused and the victim around the time of the charged offense”).

Rule 404(b)–#27

Other relationship cases:

- *People v. Khan*, 931 N.Y.S.2d 393, 394 (2011) ("The evidence was properly admitted to demonstrate the defendant's pattern of escalating sexual conduct toward the victim during the period between the charged crimes, and as relevant background information to enable the jury to understand the defendant's relationship with the victim and to place the events in question in a believable context, particularly since the defendant raised the issue of the victim's delayed disclosure of the charged criminal conduct").

- *Brown v. State*, 6 S.W.3d 571, 577-79 (Tex.Crim.App.1999) (defendant demonstrated his "ability to commit the offense alleged" and the victim's compulsion "to acquiesce" by making her kiss him and holding her by her waist and buttocks in public).

Rule 404(b)–#28

- *State v. Forbes*, 640 A.2d 13, 15-16 (Vt.1993):

"The daughter's allegations of sexual contact on one night would have seemed incredible absent the context of a continuous sexual relationship with her father. … Where the crime involves incest, the history is so interwoven with the crime, it cannot be separated without skewing the event made the subject of the charge. The case depended on the daughter's credibility in describing their incestuous relationship. The credibility of the daughter's description of that relationship depended on the whole pattern of her father's conduct toward her, and not on the integrity of any particular event."

Rule 404(b)—#29

Courts have rejected arguments that this evidence is unduly prejudicial because the jury will base its verdict solely upon its assessment of the relative credibility of the defendant and the victim, not whether the victim alleged that the defendant abused her on more occasions than charged.

See State v. Reed, 8 P.3d 1025, ¶ 31 (Utah 2000)). *Accord State v. Forbes*, 640 A.2d 13, 16-17 (Vt.1993).

Rule 404(b)—#30

- http://www.youtube.com/watch?v=ZPZFHoTAnLM (Raymond-elation over 86 minutes, 1:56)

Rule 404(b)–#31

IV. Identity exception to Rule 404(b):

- Typically, prosecutors offer uncharged acts to prove the defendant's identity as the person who committed the charged offense. *State v. Lehr*, 227 Ariz. 140, 146-47, ¶¶ 16-21 (2011); *State v. Roscoe*, 184 Ariz. 484, 491-92 (1996); *State v. Williams*, 209 Ariz. 228, 233-34 (App.2004).

- "The pattern and characteristics of the [charged and uncharged] crimes [are] so unusual and distinctive as to be like a signature." *Roscoe.*

Rule 404(b)–#32

Typical identity case:

"While identity in every particular is not required, there must be similarities between the offenses in those important aspects 'when normally there could be expected to be found differences.'" *State v. Roscoe*, 145 Ariz. 212, 217 (1984).

Similarity between the charged and uncharged acts, however, is not the only basis for the identity exception.

Rule 404(b)–#33

Defendant argues that the evidence of the previous assault was inadmissible because it was not similar to the murder. However, the other crime proved by the proffered evidence must be similar to the offense charged only if similarity of the crimes is the basis for the relevance of the evidence. “Relevant evidence is not to be excluded because it fails to meet a similarity requirement.” *United States v. Riggins*, 539 F.2d 682, 683 (9th Cir. 1976).

State v. Gulbrandson, 184 Ariz. 46, 61 (1995).

Rule 404(b)—#34

Other acts may be offered pursuant to the identity exception, without showing a "signature," through evidence showing:

- the defendant's commission of the uncharged offense places him near the charged crime's location;
- the defendant's use of the same weapon or alias during the prior offense;
- the defendant's body lice, pubic hair, and distinctive necklace;
- the defendant's reference to the charged offense while discussing the uncharged act; and
- the defendant's attempt to bribe the jury during trial for the charged offense.

Rule 404(b)–#35

Identity may be proven by showing that the defendant had a MOTIVE to commit the charged offense when the defense claims someone else did the crime.

- Most common in murder cases.

- Sexual attraction to a certain class of persons, including children, may help identify the defendant as the charged child victim's rapist and murderer. *See State v. Atwood*, 171 Ariz. 576, 638 (1992).

Rule 404(b)—#36

"Most people do not have a taste for sexually molesting children. As between two suspected molesters, then, only one of whom has a history of such molestation, the history establishes a motive that enables the two suspects to be distinguished."

U.S. v. Cunningham, 103 F.3d 553, 556 (7th Cir. 1996).

Rule 404(b)–#37

- *State v. Smith*, 23 P.3d 786, 795-96 (Idaho App. 2001) (upholding testimony that defendant expressed sexual attraction for "grandmotherly" women with large breasts as proof of his motive and identity as murderer of victim possessing those characteristics).

- *State v. Stephens*, 466 N.W.2d 781, 785-86 (Neb.1991) (prior sexual assaults against stepdaughter were admissible to rebut suggestion that gang-initiate entered through open back door and sexually assaulted 1-month-old granddaughter).

Rule 404(b)—#38

Other acts demonstrating the defendant's sexual interest in children or past sexual activity with children is probative of identity in child-pornography cases when the defendant claims that a roommate, estranged wife, hacker, or robot program secreted contraband images on his computer. (See Outline, pages 75-76.)

Rule 404(b)—#39

The defendant's attempt to shift responsibility to third parties will defeat any attempt to preclude the other-act evidence under Rule 403.

State v. Johnson (Ruben), 212 Ariz. 425, 430, ¶ 11 (2006) ("In addition, if testimony is probative on the crucial issue of identification, any slight prejudicial element is clearly outweighed by the probative value.");

State v. Schurz, 176 Ariz. 46, 52, (1993) ("Once the defendant attempted to shift responsibility to Allison, the evidence had enough probative value to withstand any Rule 403 weighing process.").

Rule 404(b)–#40

V. Motive exception to Rule 404(b).

Motive is defined as "an inducement, or that which leads or tempts the mind to indulge a criminal act." *State v. Atwood*, 171 Ariz. 576, 638 (1992).

"The fact that the defendant had some motive, good or bad, for committing the crime is one of the circumstances which, together with other circumstances, may lead the fact-finder to conclude that he did in fact commit the crime." *State v. Hunter*, 136 Ariz. 45, 50 (1983).

Rule 404(b)–#41

Evidence of a prior crime may demonstrate a defendant's motive in one of two ways:

For instance, an uncharged theft may *supply* the motive to murder an eyewitness to the theft. See EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, VOL. 1, § 3:16, 81 (REV. ED., WEST 1998). In this situation, the uncharged act is *cause*, and the charged act is *effect*.

Rule 404(b)–#41

In other cases, however, the uncharged *act <u>evidences the existence</u>* of a motive but does *<u>not supply</u>* the motive. Rather, the motive is cause, and the charged and uncharged acts are effects; that is, *<u>both</u> acts are explainable as a result of the same motive*.

State v. District Court (Salvagni), 246 P.3d 415, 431, ¶ 59 (Mont.2010) (emphasis in original). *Accord People v. Spector*, 128 Cal.Rptr.3d 31, 68 (App.2011).

Rule 404(b)—#42

Arizona recognizes both forms of motive evidence.

Compare State v. Johnson (Ruben), 212 Ariz. 425, 430, ¶ 12 (2006) (defendant's motive for murder was that victim witnessed armed robbery for which he had been charged); *with*

State v. Mott, 187 Ariz. 536, 545 (1997) (defendant's prior expressions of hatred for and acts of violence against her baby daughter was admissible because they "demonstrated defendant's lack of concern or actual dislike for her child, which could reasonably be construed as a motive for the charged offenses.").

Rule 404(b)—#43

"Prior instances of sexual misconduct with a child may establish a defendant's sexual interest in children and thereby serve as evidence of the defendant's motive to commit a charged offense involving the sexual exploitation of children." *United States v. Sebolt*, 460 F.3d 910, 917 (7th Cir. 2006).

Cf. State v. Atwood, 171 Ariz. 576, 637-38 (1992) (upholding admission of defendant's letter and conversations regarding his sexual attraction toward children because they reflected his motive for kidnapping and murdering a young girl).

Rule 404(b)—#44

Many courts have invoked Rule 404(b)'s motive exception to admit *uncharged child-pornography-related offenses at trials involving hands-on sexual offenses* against children.

State v. Ramsey, 211 Ariz. 529, 539-40 (App.2005) (defendant's possession of pornographic material—incestuous stories—was probative of his motive and intent to have sex with his young daughter). See Outline pp.79-80 for more cases.

Rule 404(b)—#45

Courts also properly admit evidence of a defendant's sexual attraction toward a specific victim or small class of persons as proof of his *motive* to commit a sexual offense against that specific individual or members of that small group. See pages 80-81 of Outline for cases.

Our court of appeals has approvingly cited in memo decisions the following passage from *Blakeney v. State*, 911 S.W.2d 508, 515 (Tex.Crim.App.1995):

Rule 404(b)—#46

However, evidence that appellant was sexually aroused while talking about the child could be viewed as giving rise to a logical inference that appellant had feelings of sexual attraction and desire toward him. Such evidence would, therefore, tend to show that appellant had a motive for sexually assaulting the child:

The sexual passion or desire of X for Y is relevant to show the probability that X did an act realizing that desire. On the principle set out above, this desire at the time in question may be evidenced by proof of its existence at a prior or subsequent time. Its existence at such other time may, of course, be shown by any conduct which is the natural expression of such desire.

Rule 404(b)—#47

Defendants might attempt to circumvent Rule 404(b)'s motive exception by arguing that Rule 404(c) is the exclusive means of admitting sexual-attraction/lewd disposition evidence.

The Arizona Supreme Court foreclosed that contention in *State v. Ferrero*, 229 Ariz. 239, 242 (2012):

Rule 404(b)—#48

Garner evidence might also be relevant for *non-propensity purposes, such as showing motive, intent, identity, or opportunity*. *If the evidence is offered for a non-propensity purpose, it may be admissible under Rule 404(b)*, subject to Rule 402's general relevance test, Rule 403's balancing test, and Rule 105's requirement for limiting instructions in appropriate circumstances. *But if evidence of other sex acts is offered in a sexual misconduct case to show a defendant's "aberrant propensity" to commit the charged act, as it was here, Rule 404(c) applies*.
(Emphasis added.)

Rule 404(b)—#49

Also note that courts have held that the preclusion of evidence under one rule of evidence does not foreclose its possible admission under another rule. *E.g., United States v. Abel*, 469 U.S. 45, 56 (1984):

"But there is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case."

See Outline, pp.79-80.

Rule 404(b)—#50

Evidence is admissible under Rule 404(b)'s motive exception to rebut the defendant's invocation of A.R.S. § 13-1407(E):

"It is a defense to a prosecution pursuant to § 13-1404 or § 13-1410 that the defendant was not motivated by a sexual interest. It is a defense to prosecution pursuant to § 13-1404 involving a victim under 15 years of age that the defendant was not motivated by a sexual interest."

Rule 404(b)—#51

VI. Intent, knowledge, and absence of mistake or accident, when the defendant places his mental state at issue and does not deny committing the criminal act.

"Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct. " *Huddleston v. United States*, 485 U.S. 681, 685 (1988).

Rule 404(b)—#52

Typical situations where other-act evidence is admissible to prove intent, knowledge, or absence of mistake or accident:

(1) Defendant admits that he touched the buttocks, breasts, or genitals of the victim, but claims that the contact occurred during a bath, while changing a diaper, tickling, wrestling or horseplay, massage therapy, while drunk or asleep, etc.

Rule 404(b)—#53

(2) Defendant arranged to meet a child he had met online for sex, but claims that:

- he thought the rendezvous was with an adult playing the role of a child (as in *U.S*. v. *Curtin* and *State v. Davis*), or

- his meeting with the child was for non-sexual purposes (like voice lessons in *United States v. Brand*).

Rule 404(b)—#54

(3) Other act evidence may be admissible in sexual-abuse or sexual-assault cases when the defendant claims that he believed the victim consented to his conduct. *See State v. Huey,* 145 Ariz. 59, 62 (1985); *Honeycutt v. State*, 56 P.3d 362, 370 (Nev.2002); *Webb v. State*, 995 S.W.2d 295, 298 (Tex.Crim.App.1999).

Why? Because A.R.S. §§ 13-1404(A) and 13-1406(A) both require the State to prove the defendant's knew that the victim did not consent or intended to have non-consensual in intercourse or oral sexual contact.

Rule 404(b)—#55

See A.R.S. § 13-202(A):

"If a statute defining an offense prescribes a culpable mental state that is sufficient for commission of the offense without distinguishing among the elements of such offense, the prescribed mental state shall apply to each such element unless a contrary legislative purpose plainly appears."

Rule 404(b)—#56

A.R.S. § 13-1404(A): “A person commits sexual abuse by intentionally or knowingly engaging in sexual contact with any person who is fifteen or more years of age without consent of that person.”

State v. Witwer, 175 Ariz. 305, 308 (App.1993): “[I]n a prosecution for sexual abuse, the state must prove that the defendant intentionally and knowingly engaged in sexual contact, and that the defendant knew that such contact was without the consent of the victim.”

Rule 404(b)—#57

A.R.S. § 13-1406(A): “A person commits sexual assault by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person without consent of such person.”

State v. Kemper, 229 Ariz. 105, 106, ¶ 5 (App.2011): “The final instruction correctly advised jurors that Kemper must have intentionally or knowingly engaged in sexual intercourse or oral sexual contact with the victim. It did not, however, properly instruct on the *mens rea* applicable to the consent element of the crime.”

Rule 404(b)—#58

The statutory definition of "without consent" in A.R.S. § 13–1401.5 contains several mental states that other-act evidence can help establish:

(b) The victim is incapable of consent by reason of mental disorder, drugs, alcohol, sleep or any other similar impairment of cognition and such condition is known or should have reasonably been known to the defendant.

(c) The victim is intentionally deceived as to the nature of the act.

(d) The victim is *intentionally deceived* to erroneously believe that the person is the victim's spouse.

Rule 404(b)—#59

Rule 404(b) admits other-act evidence to prove intent, knowledge, or absence of mistake or accident when the defendant admits that child pornography was found on his computer or otherwise within his dominion and control, but professes ignorance or claims mere presence. (See Outline, pp.86-89.)

Rule 404(b)—#60

VII. Other-act evidence may also be admitted in sexual-assault cases in which the defendant repeatedly rapes the same victim, but claims that she/he actually consented to sexual contact.

See State v. Schackart, 153 Ariz. 422, 424 (App.1987) ("One of the defenses raised by appellant was that of consent on the part of the victim. The prior acts all involved the victim and were relevant to the victim's state of mind.").

Outline page 89

Final recommendations—#1

- Invoke all applicable theories of admissibility, not just Rule 404(c).
- Reliance on Rule 404(b) exceptions in addition to Rule 404(c) gives you flexibility if the court orders a live evidentiary hearing as a condition for admission.
- The State can argue 404(b) exceptions on appeal if the trial court renders deficient findings, if the 404(c) limiting instruction is missing or wrong, or if an evidentiary hearing should have been held.

Final recommendations—#2

- The defendant's trial defenses and strategy should play a critical role in determining which Rule 404(b) exceptions apply.
- Select specific Rule 404(b) exceptions and avoid quoting the entire rule when justifying the admission of your other-act evidence to avoid reversal under *Ives.*

Final recommendations—#3

- If the trial court precludes your other-act evidence, revisit the issue if defense counsel or the defendant opens the door.

- Closing arguments: reinforce the court's limiting instruction and explain how the proffered other-act evidence serves a non-character purpose in establishing defendant's guilt (motive, intent, rebut his defense, etc.). Remarks cure judicial errors.

- Make sure the final jury instructions include ALL of your Rule 404(b) exceptions. Submit your own limiting instruction.

Gettysburg Meade Good ground

Meade arrives (:30)

http://www.youtube.com/watch?v=Hwj17m1_Ay0

DUPLICITOUS INDICTMENTS & DUPLICITOUS CHARGES

General Principles—#1

Duplicity arises in two different ways in criminal cases:

- Duplicitous indictments AND
- Duplicitous charges.

We'll discuss duplicitous indictments first.

General Principles–#2

"An indictment that charges separate or multiple crimes in the same count is duplicitous." *State v. Ramsey*, 211 Ariz. 529, 532, ¶ 6 (App.2005). Duplicitous indictments are forbidden because "[t]he law in Arizona requires that each offense must be charged in a separate count." *State v. Whitney*, 159 Ariz. 476, 480 (1989) (citing Ariz.R.Crim.P.13.3(a)).

General Principles—#3

We need to distinguish multiplicity from duplicity:

- "*Multiplicity* occurs when an indictment charges a single offense in multiple counts." *State v. Powers*, 200 Ariz. 123, 125, ¶ 5 (App.2001), *approved*, 200 Ariz. 363 (2001).
- "'The principal danger in multiplicity—that the defendant will be given multiple sentences for the same offense—can be remedied at any time by merging the convictions and permitting only a single sentence.'" *Merlina v. Jejna*, 208 Ariz. 1, 4, n.4 (App.2004).

General Principles—#4

- "The defect marking a duplicitous *indictment* is, by definition, apparent from its text," *State v. Butler*, 230 Ariz. 465, 470, ¶ 14 (App.2012).
- "The rules involving prohibition against duplicity are rules of pleading which go to the manner in which charges are to be joined or separated." *State v. Schroeder*, 167 Ariz. 47, 52 (App.1990).
- "Failure to properly plead is not fatal to an indictment or information, and dismissal is not required unless the defendant has actually suffered some prejudice." *Id*.

General Principles—#5

Duplicitous indictments violate Rule 13.3(a):

"Since Arizona law requires that each separate offense be charged in a separate count, an indictment which charges more than one crime within a single count may be dismissed as duplicitous." *State v. Schroeder*, 167 Ariz. 47, 51 (App.1990).

General Principles—#6

Why prohibit duplicitous indictments?

"The purpose behind the prohibition of duplicitous indictments is the avoidance of the following dangers: (1) failure to give the defendant adequate notice of the charges against him; (2) exposure of the defendant to the possibility of double jeopardy; and (3) conviction of the defendant by less than an unanimous jury verdict." *State v. Schroeder*, 167 Ariz. 47, 51 (App.1990).

General Principles—#7

- Because this pleading error is apparent on the charging document's face, defendants must challenge a duplicitous indictment within 20 days of trial, pursuant to Arizona Rules of Criminal Procedure 13.5(e) and 16.1(b).
- When defendants do not timely object to a duplicitous-indictment claim below, appellate courts could find the claim to be "precluded," on appeal.
- The rationale: the defendant had advance notice of the defect from the indictment's text, but deliberately elected against lodging a timely objection to deprive the State of the opportunity to "remedy any duplicity by filing a new indictment charging multiple counts [exposing him] to multiple penalties." *State v. Anderson*, 210 Ariz. 327, 335-36, ¶ 16-17 (2005).

General Principles—#8

Another good explanation appears in *State v. Butler*, 230 Ariz. 465, 470, ¶ 16 (App.2012):

"By failing to object to the indictment, the forms of verdict, or the trial court's jury instructions, a defendant demonstrates his or her 'complicity in the charge as alleged,'" and he will not be able to carry his burden of proving fundamental error because "no prejudice results from such a strategic maneuver." (quoting *State v. Rushton*, 172 Ariz. 454, 456 (App.1992)).

General Principles—#9

Caveat: Arizona courts, if anything, have rendered conflicting decisions about whether a defendant who fails to raise a timely objection to a duplicitous indictment is totally barred from obtaining relief on that forfeited claim on appeal, or whether he can establish prejudicial fundamental error, despite his failure to object below.

General Principles—#10

- In *Anderson*, the ASC categorized such a belated duplicitous indictment claim "precluded" and not subject to appellate review.
- In *Hargrave*, the ASC reviewed for fundamental error, but found none because defendant obtained a tactical advantage, the defendant had pretrial notice, and any error was cured by jury instructions and verdict forms.

General Principles—#11

- In *Butler,* the COA acknowledged the tension between *Anderson* and *Hargrave* and consequently conducted fundamental-error review. Conviction affirmed.
- In *State v. Paredes-Solano*, 223 Ariz. 284 (App.2009), the COA conducted fundamental-error review and reversed convictions that were predicated upon duplicitous counts charging the defendant with different violations of A.R.S. § 13-3553(A).

General Principles—#12

Advice: Do not ignore the risk of reversal based upon a duplicitous indictment, even if the defendant never objects below. Consider the remedial measures we'll discuss later.

Be especially vigilant about the risk that the jury could return verdicts without unanimous agreement—a defect Arizona courts deem to be prejudicial fundamental error. *See State v. Paredes-Solano*, 223 Ariz. 284, 291-92 ¶ 22 (App.2009) (collecting cases).

General Principles–#13

"Duplicitous charge" problems arise at trial.

Mistakenly equated with a "duplicitous indictment," but posing the same dangers, "[a] duplicitous charge exists 'when the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge.'" *State v. Paredes-Solano*, 223 Ariz. 284, 287, ¶ 4 (App.2009).

General Principles—#14

Why the difference matters?

- Rule 16.1(b)'s 20-day deadline for pretrial motions does NOT apply in the "duplicitous charge" context because such errors do not arise until trial, when the State's witnesses report the commission of more than one crime in support of a single charge.

General Principles—#15

Why the difference matters?

- Although duplicitous charges and duplicitous indictments present similar problems with respect to double jeopardy and jury unanimity, lack of pretrial notice is NOT as great a concern in "duplicitous indictment" situations because the plain text of the indictment describes the multiple acts.
- Conversely stated, notice problems pose greater risks in the "duplicitous charge" context because the defendant might not learn until trial that he must defend against a different act.

General Principles—#16

Remedial measures for both duplicity errors:

- The court may instruct the jury to unanimously agree on the specific act constituting the basis for its guilty verdict and/or submit special verdict forms or interrogatories that afford the jurors an opportunity to memorialize their findings as to each and every act the defendant committed.

See State v. Butler, 230 Ariz. 465, 470, n.4 (App.2012) ("A court may then cure the error through a special verdict form or jury instruction.").

General Principles–#17

Remedies for both duplicity errors:

- The court may require the prosecution to elect which act constitutes the basis for the charged offense.

See State v. Paredes-Solano, 223 Ariz. 284, 290, ¶ 17 (App.2009) ("However, the error potentially resulting from such an indictment may be cured when … when the state elects for the jury which act constitutes the crime[.]").

General Principles–#18

Remedies for both duplicity errors:

- The State identified which specific act is the basis for the charged offense during opening statement and/or closing argument.

See State v. Hamilton, 177 Ariz. 403, 410 (App.1993) ("The victims testified as to the specific occurrence that formed the basis for each specific count, and the state clearly delineated during closing arguments what specific conduct constituted the offense charged in each specific count.").

General Principles—#19

- *United States v. Miller*, 520 F.3d 504, 513-14 (5th Cir. 2008) (prosecution's closing remarks cured allegedly duplicitous tax-evasion charge by identifying the specific transaction underlying the indicted offense).

- *State v. Molen*, 231 P.3d 1047 (Idaho App. 2010) (rejecting challenge to absence of a special unanimity instruction in a case where the defendant was charged with one act of genital-to-genital contact with a child, but evidence of more than one act was presented, because the prosecutor elected the charged incident during opening statement and closing arguments, as well as the State's trial evidence).

General Principles–#20

Note that while closing arguments might cure a potential duplicity problem, the prosecutor will all but guarantee reversal should he or she tell the jury that they need not unanimously agree upon the same act to find the defendant guilty.

See Paredes–Solano, 223 Ariz. at 291, ¶ 19 (holding error caused by duplicitous indictment "was exacerbated during jury instructions and the state's closing argument").

General Principles–#21

These remedial measures are not required in the following situations:

- When an element of the charged offense requires proof that the defendant engaged in conduct that happened to violate a different statute. *State v. Whitney*, 159 Ariz. 476, 480 (1989) ("The fact that one of the elements of the crime alleged is a separately indictable offense does not render the indictment duplicitous. In this respect, the indictment is no different than an indictment under the felony-murder statute.").

- "Where numerous transactions are merely parts of a larger scheme, a single count encompassing the entire scheme is proper." *State v. Via*, 146 Ariz. 108, 116 (1985) (credit card fraud).

General Principles–#22

Remedial measures not required when the statute defines a "unitary" offense and allows the State to prove the defendant's guilt without jury unanimity as to which of the multiple means by which the defendant committed the crime. Why? "A count is not considered duplicitous merely because it charges alternate ways of violating the same statute." *State v. O'Brien*, 123 Ariz. 578, 583 (App.1979).

Rule governs kidnapping (*Herrera),* first degree murder (*Encinas/Schad*), and theft (*Cotten*), but NOT aggravated assault (*Sanders*).

General Principles–#23

Remedial measures not required:

- "[W]here a series of acts form part and parcel of one and the same transaction, and as a whole constitute but one and the same offense." *State v. Solano*, 187 Ariz. 512, 520 (App.1996) (quoting *State v. Counterman*, 8 Ariz.App. 526, 531 (1968)).

Important qualifier: "multiple acts may be considered part of the same criminal transaction 'when the defendant offers essentially *the same defense* to each of the acts and there *is no reasonable basis for the jury to distinguish between them*.'" *State v. Klokic*, 219 Ariz. 241, 245, ¶ 18 (App.2008) (quoting People v. Stankewitz, 793 P.2d 23, 41 (Cal.1990)).

General Principles–#24

Thus, the *Counterman/California* rule will ***not*** cure the duplicity issue when the defendant raises a different defense to each discrete act offered in evidence.

- *State v. Davis*, 206 Ariz. 377, 389, ¶ (2003) (evidence of two acts of sexual intercourse occurring 11 days apart constituted a duplicitous charge because "unlike the defendant in *Schroeder*, Davis offered more than one defense," an alibi defense to one and a denial as to the other).

- *State v. Paredes-Solano,* 223 Ariz. 284, 291, ¶ 20, (App.2009) ("Moreover, during trial, Paredes–Solano presented multiple defenses to the various acts with which he was charged.").

General Principles—#25

An appellate court will uphold a conviction against a duplicity challenge if the defendant suffered no actual prejudice, such as when:

- Overwhelming evidence establishes guilt as to each criminal act presented at trial. *State v. Kelly*, 149 Ariz. 115, 117 (App. 1986) ("In this case, since the whole incident was recorded on tape and since the defendant, the victim, and two witnesses all agree that the defendant did point a rifle at the victim and did cause serious physical harm to the victim with a knife, it is hard to see any prejudice [from an indictment charging the defendant with only one count of aggravated assault].")

General Principles–#26

No actual prejudice results when:

- The defendant presented the *same defense* to each of the multiple acts constituting the potential basis for a guilty verdict. *State v. Schroeder*, 167 Ariz. 47, 52-53 (App.1990) (despite evidence defendant had fondled the victim on multiple occasions to prove one count of child molestation, no prejudice because the defendant denied any sexual abuse, and the sole issue before the jury was which witness was more credible).

Wedding Invitations (3:44)
http://www.youtube.com/watch?v=c5DERppkIG0

Sex Crime Duplicity—#1

Sex-crime cases have ample potential for generating duplicity issues.

- Arizona courts have issued numerous opinions holding that a defendant may be charged with and sentenced for each sexual violation of his victim, even if all of these crimes were committed against the same person, in rapid-fire succession during the same incident, and at one location.

Sex Crime Duplicity—#2

Some examples: *State v. Griffin*, 148 Ariz. 82, 86 (1986) (rejecting double-jeopardy challenge to consecutive sentences for four different sexual assaults, where "[e]ach felonious act was performed independent of the others and was completed prior to the beginning of the next act," and finding it "irrelevant that the acts were committed within a relatively short time span").

- *State v. Hill*, 104 Ariz. 238, 240 (1969) ("When several acts of intercourse and several lewd and lascivious acts are committed on the same victim we see no reason why as many counts for each offense cannot be brought, despite the fact the defendant never left his victim's bed during the course of the commission of the acts.").

Sex Crime Duplicity—#3

- *State v. Williams*, 182 Ariz. 548, 562–64 (App.1995) (upholding imposition of consecutive sentences for multiple acts of fellatio and intercourse occurring in rapid succession during the same rape episode) (collecting cases).

- *State v. Boldrey*, 176 Ariz. 378, 381 (App.1993) ("Multiple sexual acts that occur during the same sexual attack may be treated as separate crimes.").

Sex Crime Duplicity—#4

This problem is exacerbated by the fact that *victims often surprise prosecutors* and defense attorneys alike by testifying about uncharged acts that they did not disclose during pretrial interviews or debriefings, but recalled during the course of recounting the charged offense(s) at trial. *See State v. Marshall*, 197 Ariz. 496, 500, ¶¶ 8-12 (App.2000).

Sex Crime Duplicity—#5

Because duplicity challenges arise from evidence showing that the defendant committed the same type of conduct on multiple occasions, we must determine that crime's "unit of prosecution"—an inquiry that will help us identify whether the multiple acts combine to form one offense or multiple offenses.

See Sanabria v. United States, 437 U.S. 54, 69-70 (1978) (unit of prosecution is a question of legislative intent).

Sex Crime Duplicity—#6

A.R.S. § 13-1417 is "a continuing course of conduct statute." Consequently, the State does not generate a duplicity problem of either species by offering evidence that the defendant engaged in sexual assault, molestation, or sexual intercourse with the same victim on three or more occasions during at least a 3-month period before the victim's fourteenth birthday.

"The *actus reus* of § 13-1417 is the pattern of sexual assaults—the continuous course of conduct—rather than each individual act." *State v. Ramsey*, 211 Ariz. 529, 538, ¶ 28 (App.2005).

Sex Crime Duplicity—#7

- For violations of A.R.S. § 13-3553, the unit of prosecution is *each visual depiction* of child pornography, even when the visual depictions are found on the same computer media or constitute duplicate copies of *the same image or movie file*. *State v. McPherson*, 228 Ariz. 557, 560, ¶¶ 6-7 (App.2012).

A "'[v]isual depiction' includes each visual image that is contained in an undeveloped film, videotape or photograph or data stored in any form and that is capable of conversion into a visual image." A.R.S. § 13–3551(11).

Sex Crime Duplicity—#8

Regardless of the unit of prosecution prescribed by statutes prohibiting hands-on offenses, such as sexual conduct with a minor (A.R.S. § 13-1405(A)), molestation of a child (A.R.S. § 13-1410(A), and incest (A.R.S. 13-3608), Arizona courts have found sexual acts occurring on <u>different days</u> to give rise to separate counts.

Sex Crime Duplicity—#9

- *State v. Davis*, 206 Ariz. 377, 389-91, ¶¶ 54-66 (2003) (solitary charge of sexual conduct with a minor was duplicitous because it was predicated upon two acts of intercourse with same underage girl occurred 11 days apart) (citing *Hash v. State*, 48 Ariz. 43, 50 (1936)).
- *Spencer v. Coconino County Superior Court*, 136 Ariz. 608, 610 (1983) (finding duplicitous an indictment charging the defendant with one count of incest and one count of child molestation, where the facts giving rise to these charges involved over 100 separate incidents occurring over 13 months).

Sex Crime Duplicity—#10

- *State v. Marshall*, 197 Ariz. 496, 504, ¶ 30 (App.2000) (rejecting argument that court should vacate two of defendant's three convictions for child molestation as being based on the same continuous act, where the videotape depicted the victim masturbating herself at defendant's direction on three different occasions between Oct. 4th through Oct. 8th).

Sex Crime Duplicity—#11

"Sexual intercourse" is defined by statute as "penetration into the penis, vulva or anus by any part of the body or by any object or masturbatory contact with the penis or vulva." A.R.S. § 13–1401(3).

Thus, the unit of prosecution for any crime having "sexual intercourse" as an element appears to be each "penetration."

Sex Crime Duplicity—#12

The following cases support this view:

- *State v. Bruni*, 129 Ariz. 312, 315 (App.1981) (upholding separate counts per act of sexual intercourse with each rape victim).
- *State v. Williams*, 182 Ariz. 548, 562–64 (App.1995) (upholding imposition of consecutive sentences for multiple acts of fellatio and intercourse occurring in rapid succession during the same rape episode) (collecting cases).
- *State v. Stuck*, 154 Ariz. 16, 22 (App.1987) (upholding consecutive sentences for separate and distinct sexual assaults committed on the same day).

Sex Crime Duplicity—#13

- *State v. McCuin*, 167 Ariz. 447, 449 (App.1991) ("Here, the evidence offered by the state sufficiently established the separate acts of defendant's placing his finger in the victim's vagina and placing his penis in the victim's vagina. Each act constituted intercourse as defined by A.R.S. § 13–1401 and each was established without reference to the elements of the other. When several sexual acts result from the same sexual attack, the defendant may be charged with more than one crime.").

Sex Crime Duplicity—#14

The statutory definitions of "oral sexual contact" and "sexual contact" indicate that a separate charge may be based upon physical contact with *each body part* of the *defendant* and the *victim*.

A.R.S. § 13-1401.1: "'Oral sexual contact' means oral contact with the penis, vulva, or anus."

A.R.S. § 13-1401.2: "'Sexual contact' means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact."

Sex Crime Duplicity—#15

Thus, a defendant may be charged with four counts of child molestation if he engaged in the following acts during the same incident:

- he touched the genitals of the victim;
- he touched the victim's anus;
- he made the victim touch his penis;
- he made the victim touch his anus.

Sex Crime Duplicity—#16

Likewise, the defendant could be prosecuted for four counts of sexual assault or sexual conduct with a minor if:

- he had oral sexual contact with the victim's genitals;
- the victim had oral sexual contact with the defendant's genitals;
- the defendant had oral sexual contact with the victim's anus; and
- the victim had oral sexual contact with the defendant's anus.

Sex Crime Duplicity—#17

The much more difficult question arises in child molestation cases where the defendant and the victim have sexual contact with each other when:

(1) the petting occurs mere moments apart during the same episode of sexual activity, and

(2) no intervening event interrupts the abuse (i.e., an unexpected visitor's arrival, a meal, a television show, an errand, or the departure of either person).

Sex Crime Duplicity—#18

Arizona has no authority precisely on point, particularly in the child-molestation and sexual-abuse contexts.

- Conceivably, you could rely upon the "continuing-course-of-conduct" test, "where a series of acts form part and parcel of one and the same transaction, and as a whole constitute but one and the same offense." *State v. Solano*, 187 Ariz. 512, 520 (App.1996) (quoting *State v. Counterman*, 8 Ariz.App. 526, 531 (1968)). Be on guard if the defendant raises different defenses to each act, or a reasonable basis exists to distinguish between the multiple acts.

Sex Crime Duplicity—#19

Another tactic to consider in this child-molestation situation: Charge each and every distinct act of sexual contact that the victim recalls as a separate count.

If the court finds these charges multiplicitous because they allege the same offense in two counts, the remedy is the vacating of one of the two resulting convictions and sentences, but the other count's verdict and sentence will be affirmed. In contrast, charging two or more offenses in the same count—a duplicitous indictment—will result in reversal of the one and only conviction and mandate retrial. Multiplicity is the lesser of the two evils.

Sex Crime Duplicity—#20

Duplicity violation found in *State v. Paredes-Solano*, wherein the State charged a child-pornography defendant with one count of sexual exploitation of a minor, based upon four different acts (photographing, developing, transporting, and possessing) with respect to the charged visual depiction.

Two of these acts (photographing and developing) were prohibited by A.R.S. § 13–3553(A)(1), and the other two (transporting and possessing) were banned by § 13–3553(A)(2).

Sex Crime Duplicity—#21

The COA examined the statutory text first:

A. A person commits sexual exploitation of a minor by knowingly:

1. Recording, filming, photographing, developing or duplicating any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct.

2. Distributing, transporting, exhibiting, receiving, selling, purchasing, electronically transmitting, possessing or exchanging any visual depiction in which a minor is engaged in exploitive exhibition or other sexual conduct.

Sex Crime Duplicity—#22

This plain language led the COA to conclude that subsections (1) and (2) of Section 13-3553(A) defined two separate crimes, because "the acts listed in subsection (A)(1) are directed at the creation of a visual image whereas those in subsection (A)(2) can only occur after an image has been created.

Thus, the statute addresses two separate harms—the creation of visual images and their subsequent distribution and viewing. This suggests a legislative intention to create two separate offenses, each encompassing a distinct phase of the child pornography production and distribution process."

Sex Crime Duplicity—#23

The COA found its conclusion reinforced by the statute's legislative history and the recognition by Arizona courts that child pornography harms children in different ways—the abuse during its creation and the invasion of the victim's privacy in its dissemination.

Sex Crime Duplicity—#24

Holding in *Paredes-Solano*:

"The actions listed in subsection (A)(1) cause harm to the child in the *creation* of the visual images, while the acts in subsection (A)(2) harm the child through the *perpetuation* of those images. Each subsection is violated by distinctly different conduct causing different kinds of harm to the child. The two subsections thus represent more than merely different ways of committing a single offense and, we conclude, create offenses that are separate and distinct. …"

Sex Crime Duplicity—#25

Holding (continued):

… Here, counts one and two of the indictment allege six separate criminal acts drawn from the two subsections in § 13–3553(A). At trial, the state produced evidence of four acts: photographing, developing, transporting, and possessing images. Photographing and developing are violations of § 13–3553(A)(1); transporting and possessing are violations of subsection (A)(2). Thus, the indictment alleged multiple offenses within a single count and was duplicitous on its face.

Sex Crime Duplicity—#26

One plausible construction of *Paredes-Solano*:

(1) subsections A and B define two separate crimes—with A targeting the creation of child pornography (photographing) and B targeting its distribution and consumption—with the consequence being that a single count alleging acts listed in both subsections is facially duplicitous; BUT

(2) the various acts listed within each subsection merely constitute different means of committing the same offense, and juror unanimity is not required on which particular act the defendant committed (as in *Schad*, *Encinas*, *Herrera*, *Cotten*, and *Dixon*).

Sex Crime Duplicity—#27

Not so fast!

The COA found that the defendant suffered actual prejudice from the duplicitous indictment because he raised different defenses to two types of acts listed in Section 13-3553(A)(1)—"photographing" and "developing."

Sex Crime Duplicity—#28

"Moreover, during trial, Paredes–Solano presented multiple defenses to the various acts with which he was charged. He defended against the *photographing* allegation by arguing 'that somebody other than ... Paredes[-Solano] had access to th[e] camera ... because we have pictures of [him] that he obviously didn't take himself.' And, although he admitted taking the film to Walgreens to be *developed*, he claimed he did not know he was transporting, *developing*, or possessing sexually exploitive photographs…. Thus, some members of the jury may have believed Paredes–Solano took the photographs, whereas others may have believed someone else took them but that Paredes–Solano knew what was depicted on the film when he took it to be developed."

Sex Crime Duplicity—#29

Recommendation: Given this uncertainty, the best course is to charge each act described in Section 13-3553(A)(1) and (A)(2) separately, even when they are listed in the same subsection. The worst that will happen is that the court will find the indictment multiplicitous, vacate the excess counts, but let one conviction and sentence stand.

Sex Crime Duplicity—#30

Defendants will sometimes raise duplicitous-charge claims on appeal based upon the following coincidences:

(1) the State offered, pursuant to Rule 404(b) or Rule 404(c), other-act evidence showing that the defendant engaged in the same type of criminal conduct with the victim during the charged incident and on other occasions;

(2) the trial court's jury instructions did not identify the specific conduct admitted as other-act evidence; and

(3) the court did not give the jury an instruction requiring unanimity regarding the act underlying their verdicts.

Sex Crime Duplicity—#31

- State v. Sanchez, 2011 WL 283313 (Jan. 27. 2011) (unreported decision where defendant raised a duplicitous-charge argument where the State offered other-act evidence involving the same two victims pursuant to Rule 404(c), but affirming the conviction because the prosecutor identified the charged incidents during closing argument, the charged and uncharged incidents involved different kinds of sexual activities, and the defendant's trial defense applied equally to the charged and uncharged acts).

Sex Crime Duplicity—#32

This situation arose in State v. Curtis, case in which the defendant was convicted on 15 counts of sexual exploitation of a minor for possessing child pornography on various computer storage devices and four counts of molesting the same child, whom he photographed during sex acts.

To rebut the defendant's theory that someone else downloaded the contraband images found on his USB device, the State offered evidence that duplicates of the charged images were found on computers and other storage media found inside the defendant's home and car. The State also offered in evidence uncharged images of the defendant molesting the victim to rebut the defendant's misidentification and lack-of-sexual-motivation defenses.

Sex Crime Duplicity—#33

Because the trial court's instructions neither specified the images that constituted other-act evidence, nor included a unanimity instruction, the defendant is arguing on this pending appeal that the jury could have found him guilty of possessing visual depictions of child pornography without unanimously agreeing upon which computer device contained the image at issue.

Sex Crime Duplicity—#34

This situation can be avoided by:

- requesting a limiting instruction immediately after the introduction of the other-act evidence during trial;
- special verdict forms specifying the basis for each count;
- submitting a proposed jury instruction that comprehensively identifies the acts/images that were offered pursuant to Rule 404(b) and Rule 404(c); and
- closing remarks that delineate the acts that constitute the basis for the charged offenses, identify the acts that were offered under Rule 404(b) and/or Rule 404(c), and remind the jury that they must base their verdicts on the charged acts.

Remedies—#1

We will now examine how to choose among the prescribed remedies to cure the evils caused by duplicitous charges and indictments:

(1) the defendant's inability to interpose a double-jeopardy defense;

(2) the lack of jury unanimity; and

(3) the lack of adequate notice of the charge for which he would stand trial.

Remedies—#2

These remedies include the following:

(a) The court may give an instruction and a special verdict form requiring the jury to unanimously agree on at least one of the specific acts that the trial evidence shows the defendant committed.

(b) The court may require the prosecution to elect which act constitutes the basis for the charged offense.

(c) The State identified which specific act is the basis for the charged offense during its opening statement and closing arguments.

Remedies–#3

We will also examine how to avoid creating different reversible errors while employing the remedies detail above.

We'll address pretrial notice first, double jeopardy second, and jury unanimity last.

Remedies—#4

Pretrial Notice.

The Sixth Amendment: “In all criminal prosecutions, the accused shall enjoy the right … to be informed of the nature and cause of the accusation.”

“For Sixth Amendment purposes, when a defendant does not receive constitutionally adequate notice of the charges against him, he is necessarily and actually prejudiced.” *State v. Freeney*, 223 Ariz.110, 114 (2009). *Sheppard v. Rees*, 909 F.2d 1234, 1237 (9th Cir. 1989) (“A trial cannot be fair unless the nature of the charges against a defendant are adequately made known to him or her in a timely fashion.”).

Remedies—#5

Pretrial notice is not an issue in the "duplicitous indictment" context because the charging document necessarily describes each one of the multiple acts for which he could be convicted.

See State v. Butler, 230 Ariz. 465, 470, ¶ 14 (App.2012) ("The defect marking a duplicitous indictment is, by definition, apparent from its text, meaning it might not deprive a defendant of the 'fundamental right to reasonable notice of the criminal acts charged against him,' [citation omitted] in the same manner as a duplicitous charge.") .

Remedies—#6

Pretrial notice:

Whereas pretrial notice is not an issue with respect to "duplicitous indictments," it is a problem with "duplicitous charges," because that error does not arise until trial, when the State seeks to prove the defendant's guilt on a single count by offering evidence that the defendant engaged in the prohibited conduct on multiple occasions.

Remedies—#7

Significantly, none of the methods that we use to cure duplicitous indictments—closing arguments, jury instructions and verdict forms, and election of the charged act—remedy the defendant's lack of pretrial notice of duplicitous charges.

Why? These remedies cannot be employed until trial itself.

Remedies—#8

Fortunately, prosecutors have other tools available to demonstrate that the defendant suffered no violation of his Sixth Amendment right to pretrial notice. Why?

A: The Supreme Court has never held that "the only constitutionally sufficient means of providing the notice required by the Sixth and Fourteenth Amendments is through the charging document." *Hartman v. Lee*, 283 F.3d 190, 195 (4th Cir. 2002) (collecting cases). *Accord State v. Freeney*, 223 Ariz. 110, 114, ¶ 29 (2009) ("For Sixth Amendment purposes, courts look beyond the indictment to determine whether defendants received actual notice of charges, and the notice requirement can be satisfied even when a charge was not included in the indictment.").

Remedies—#9

Non-indictment methods of providing notice include:

- allegations of sentencing-enhancement statutes that require proof of the act constituting the basis of the charge;
- information disclosed to the defendant during the discovery process;
- State motions in limine or other pretrial pleadings that indicate the intention to prove the commission of the other act.

Remedies—#10

Other methods of providing notice include:

- Prosecutorial statements regarding the evidence the State will offer at trial during settlement conferences;

- Providing the court of any pretrial defense interviews that show that the defendant knew that the State could offer evidence of the act at issue.

Remedies—#11

Caveat: These countermeasures will fail if the State assures the defendant that a certain act constitutes the basis for the charged offense, but then shifts gears at trial to prove guilt on the basis of a completely different act.

See State v. Johnson, 198 Ariz. 245, 248, ¶ 9 (App.2000) (holding that the defendant lacked adequate notice of the charged offense because the State had moved to amend the indictment before trial—the consequence of which was that the defendant had no reason to expect that the State would attempt to convict him at trial on the charge originally alleged, but subsequently abandoned).

Remedies—#12

Generally speaking, defendants who present all-or-nothing defenses, such as denying the commission of the offense and challenging the victim's credibility, fail to demonstrate actual prejudice from the alleged notice violation.

See State v. Freeney, 223 Ariz. 110, 115, ¶ 28 (2009) (defendant suffered no prejudice from the erroneous morning-of-trial amendment of indictment to reflect new aggravated assault theory, partly because "his 'all or nothing' defense—someone else was the perpetrator—applied equally to the amended charge.").

Remedies—#13

No prejudice where the defense is not affected by notice violation:

- *State v. Schroeder*, 167 Ariz. 47, 53 (App.1990) (defendant charged with a single count of sexual abuse was not prejudiced by the victim's testimony to seven separate acts because his "only defense was that the acts did not occur," which left "the jury was … with only one issue—who was the more credible of the only two witnesses to the alleged acts?").

Remedies—#14

Beware: Courts will nonetheless reverse a conviction if the defendant's ability to present a defense was actually prejudiced by the State's mid-trial change of theory or its reliance upon a different act for the basis of the charge submitted to the jury. Examples:

State v. Blakley, 204 Ariz. 429, 438-41, ¶¶ 42-58 (2003) (the addition of child abuse as a new predicate felony after both parties had rested in a first-degree murder, and the defendant had premised his entire defense on the indictment's sole designated predicate felony, sexual assault).

Remedies—#15

- *State v. Johnson*, 198 Ariz. 245, 248-49, ¶¶ 7-12 (App.2000) : Prosecution's motion to amend the indictment, granted at the close of its case, reversible error where:

- the victim testified that defendant had penile/vaginal intercourse with her, but the indictment alleged digital penetration, and the victim testified that defendant caused her to touch his penis with her mouth, but the indictment alleged that she had manual contact; and

- the defendant's universal defense denying any sexual acts with victim not enough, because the amendment's timing "seriously undercut [defendant's] opportunity to attack the victim's inconsistent statements ... and inhibited his right to defend himself against her accusations".

Remedies—#16

Recommendations in cases involving duplicitous charges:

- Be prepared to demonstrate that the defendant had actual pretrial notice of the alternative bases for conviction on a single charge by means other than the indictment. Reproduction of the police reports and other discovery materials for inclusion in the record on appeal is especially appropriate when defense counsel disputes pretrial notice.

Remedies—#17

If the defendant encountering a duplicitous charge legitimately shows that he was surprised by the presentation of evidence of certain acts that he cannot rebut, the prosecutor should attempt to minimize the likelihood of reversal on appeal by:

- elect the criminal act of which the defendant had adequate notice;

- decline the trial court's offer to submit interrogatories or special-verdict forms requiring jury findings on those acts against which the defendant could not properly defend because of deficient notice;

Remedies—#18

- explicitly urge the jury during closing argument to base their verdict solely upon the act of which the defendant had adequate notice, and not to convict the defendant for those act(s) for which he lacked sufficient notice;

- agree to an instruction requiring the jury to disregard the testimony regarding the problematic acts and the striking of such testimony from the record; and/or

- request a limiting instruction designating the conduct posing notice problems as other-act evidence (a remedial measure that you should invoke only when the defendant was aware of evidence that he committed these acts, but was unaware that they might be submitted to the jury as a charged offense, as in *Johnson*).

Remedies—#19

Double Jeopardy:

- Jeopardy attaches during jury trials when the court impanels the venire. *See Crist v. Bretz*, 437 U.S. 28, 37-38 (1978).

- During bench trials, jeopardy attaches when the State's first witness is sworn. *See Serfass v. United States*, 420 U.S. 377, 388 (1975).

- After either triggering event, the Double Jeopardy Clause will prevent the State from subjecting the defendant to a successive prosecution for any of the criminal acts described in the duplicitous indictment.

Remedies—#20

Defendants interposing a double-jeopardy defense during subsequent proceedings are not limited to the four corners of the prior case's indictment, but instead may consult the prior proceeding's entire record.

See State v. Lombardo, 104 Ariz. 598, 599 (1969) ("That information was fully developed at trial, and the record will be available to Lombardo as a bar to any subsequent action which might be filed against him for the same offense.").

Remedies–#21

Remedies for double jeopardy problems:

- Special verdict forms and interrogatories are the most efficacious, regardless of whether the problem is a duplicitous indictment or duplicitous charge, because the jury will have memorialized its verdict as to each potential basis for conviction on the forms returned in open court.

Remedies–#22

Remedies for double jeopardy problems: election

- No DJ problem in duplicitous-indictment context because jeopardy attached at beginning of trial and the count at issue plainly described the act at issue. *See State v. Schroeder*, 167 Ariz. 47, 52 (App.1990) ("Here the specific acts summarized in the indictment were introduced into evidence at trial. Defendant, therefore, can never again be prosecuted for any of these incidents.").

Remedies—#23

Remedies for double jeopardy problems.

Forcing the State to elect basis of charge:

- Duplicitous-charge scenario—the election remedy guarantees the defendant's ability to raise a DJ defense to the *selected* act.
- Efficacy less clear as to the act the State did NOT elect to submit to the jury in the duplicitous *charge* context.
- One view: the State designated the non-selected act as other-act evidence. No jeopardy attached because the unelected act was not described in the indictment, but mentioned by witness unexpectedly.

Remedies–#24

Danger posed by election remedy in the duplicitous charge situation:

If the grand jury transcript identifies a certain act as the basis of the charge, resist the temptation to *elect the newly disclosed act* that did not become known until trial.

- *DeJonge v. Oregon*, 299 U.S. 353, 362 (1937) ("Conviction upon a charge not made would be sheer denial of due process.").

Remedies—#25

- *State v. Martin*, 139 Ariz. 466, 472, 679 P.2d 489, 495 (1984) ("The indictment clearly charges both Martin and Phelps with the sale of cocaine to an unnamed buyer. The problem arose at the close of evidence, when the indictment was interpreted by the prosecution and the trial court to allow the argument that the defendant could be convicted for sale of cocaine to Phelps. This allowed the prosecutor to argue to the jury that a verdict of guilty could be returned even if that verdict were based on a transaction with which the defendant had not been charged.").
- Other cases: *State v. Johnson* ; *State v. Mikels.*

Remedies—#26

Remedies for double jeopardy problems:

General instructions requiring the jurors to unanimously agree on the act constituting the basis for their verdict and the closing arguments of the parties also enable the defendant to raise a double-jeopardy defense to re-prosecution.

However, these remedies require the parties to consult the prior case's entire record and therefore lack the definitive clarity provided by the verdict-form and prosecutorial-election measures.

Remedies–#27

Jury unanimity: remedies.

- Special verdict forms or interrogatories are the best remedies.
- Prosecutorial election also guarantees unanimity.
- Less clean, but efficacious, is a final jury instruction that requires the jurors to unanimously agree upon the same act, but without an accompanying special verdict form to reflect which act the conviction is based. Rely on presumption juries follow instructions.

Remedies–#28

Jury unanimity: remedies.

- Closing arguments identifying the precise basis of each charge have been found sufficient in cases from Arizona and other jurisdictions.

- Closing arguments by the prosecution and defense counsel should not be the sole remedy employed to cure a duplicity problem. Instead, it is preferable to use closing remarks to reinforce other remedial measures, like unanimity instructions not accompanied by special verdict forms.

Remedies—#29

- Closing arguments identifying the precise basis of each charge have been found sufficient in cases from Arizona and other jurisdictions.

- Nonetheless, this remedy is more appropriately used to supplement others, such as general unanimity instructions that are not accompanied by special verdict forms.

EXPERT TESTIMONY ISSUES

Expert overview—#1

This part of the seminar will address whether expert testimony regarding the behavioral characteristic of the victims and perpetrators of sex crimes:

- impermissibly vouches for the credibility of the victim;
- constitutes inadmissible profile evidence; and
- remains admissible in light of the revisions to Arizona Rule of Evidence 702, which adopted the federal standard set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997); and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

Expert overview—#2

This outline was prepared with one expert in mind: Wendy Dutton, whom prosecutors statewide call to testify as a blind expert at sex-crimes trials.

Expert overview—#3

Highlights of Wendy Dutton's testimony:

The five stages of the "process of victimization":

"[1] victim selection followed by [2] engagement or developing a relationship with the victim, [3] grooming which is introducing physical contact and sexuality, then [4] the actual sexual assault, and then [5] concealment, referring to how perpetrators encourage children to remain silent about the abuse."

Expert overview—#4

Dutton also relates the following characteristics of children sex-crime victims:

- Typically [victims] do not fight back or resist abuse or tell right away," but more commonly learn to cope or accommodate the abuser.
- How children cope with sexual abuse: daydreaming, focusing on pleasurable sensations, out-of-body experiences, escape mechanisms.
- Behavioral response to abuse: many do not manifest any changes; the others exhibit a wide array of responses—suicide, mutilation, sexual acting out, drug abuse, withdrawal, etc.

Expert overview—#5

Dutton's rendition of characteristics of children sex-crime victims:

- delayed disclosure is the norm and the reasons why a child might not disclose immediately;
- piecemeal versus full disclosure;
- demeanor of children during disclosure varies;
- malicious false allegations—Dutton lists three scenarios—mental illness, contested divorces, and teenage girls seeking advantage. Calls false reporting rare. [This is problematic: Herrera]

Another doctor's opinion on child credibility.

http://www.youtube.com/watch?v=4FTVn3QyrYo (3:40 Bill Cosby)

Expert overview—#6

The ultimate source of Wendy Dutton's testimony is the research of Dr. Roland Summit, who developed CSAAS, or Child Sexual Abuse Accommodation Syndrome, which is a compilation of behaviors commonly found among children who were victims of sexual abuse.

For an excellent synopsis of CSAAS, read *State v. J.Q.*, 617 A.2d 1196, 1203-05 (N.J.1993), which appears on pages 5-7 of the Outline. Also see MYERS ET AL., EXPERT TESTIMONY IN CHILD SEXUAL ABUSE LITIGATION, 68 NEB.L.REV. 1, 67–68 (1989).

Expert overview—#7

CSAAS details five behaviors, w/ the first two serving as precursors to abuse and the latter three occurring later:

- secrecy at the behest of the abuser
- helplessness, due to dependence and abuser's adult status
- entrapment and accommodation to abuse
- delayed, conflicting, and unconvincing disclosure
- retraction of allegations

CSAAS is a tool for treating, not diagnosing, sexually abused children:

Expert overview—#8

"Summit did not intend the accommodation syndrome as a diagnostic device. The syndrome does not detect sexual abuse. Rather, it assumes the presence of abuse, and explains the child's reactions to it. Thus, child sexual abuse accommodation syndrome is not the sexual abuse analogue of battered child syndrome, which is diagnostic of physical abuse. With battered child syndrome, one reasons from type of injury to cause of injury. … With child sexual abuse accommodation syndrome, by contrast, one reasons from presence of sexual abuse to reactions to sexual abuse. Thus, the accommodation syndrome is not probative of abuse."

State v. J.Q., 617 A.2d 1196, 1209-10 (N.J.1993).

Expert overview—#9

My experience from more than 30 cases from around the state:

Arizona prosecutors call experts to give "blind" testimony, with no familiarity with the facts of the case. We do not elicit opinions that the behavior of the victim and/or the defendant is consistent with sexual abuse, or that the victim is credible—which is fortunate because, as shall be explained below, such testimony would be inadmissible.

Expert overview—#10

There are four genres of expert testimony regarding characteristics of child sex-crime victims:

- Rehabilitative or rebuttal testimony to explain counterintuitive behaviors of sexually abused children. (OK).
- Profile/syndrome testimony, which correlates the victim's behaviors to those found among other sexually abused children (Not OK unless door opened by defense).
- ultimate issue testimony—opinion that the victim was sexually abused (not OK);
- vouching testimony—the victim's allegations are true, or most children's allegations of sexual abuse are truthful (not OK).

Expert overview—#11

Rebuttal/rehabilitative use of behavioral-characteristics evidence is allowed in Arizona and accepted in all but three jurisdictions (Ky., Pa., and Tenn.).

Pages 7-9 of the Outline collect these cases. For an excellent compilation, see *Sanderson v. Commonwealth*, 291 S.W.3d 610, 619-22 (Ky.2009) (Scott, J., concurring and dissenting).

Expert overview—#9

State v. Lindsey, 149 Ariz. 472, 473-74 (1986):

"We cannot assume that the average juror is familiar with the behavioral characteristics of victims of child molesting. Knowledge of such characteristics may well aid the jury in weighing the testimony of the alleged child victim. Children who have been the victims of sexual abuse or molestation may exhibit behavioral patterns (e.g. recantation, conflicting versions of events, confusion or inarticulate descriptions) which jurors might attribute to inaccuracy or prevarication, but which may be merely the result of immaturity, psychological stress, societal pressures or similar factors as well as of their interaction."

Expert overview—#10

Although some courts require delaying the admission of this rehabilitative evidence until the State's rebuttal case, *see State v. J.Q.*, 617 A.2d 1196, 1201 (N.J.1993), most permit the prosecution to present this evidence in its case in chief.

The rationale is that the State's own evidence will relate behaviors that the jury will find incompatible with the allegations of sexual abuse, such as the victim's delayed or piecemeal disclosure or recantations. (See Outline, pp.9-10, which collects cases.)

Expert overview—#11

Arizona courts have not squarely addressed whether such rehabilitative testimony should await the defense attacking the victim's credibility, but the following precedent shows that its preemptive use would not be reversible error.

- Arizona lets prosecutors draw the sting with cooperating witnesses testifying pursuant to a plea agreement.
- Arizona and other courts justify admission of evidence to respond to defense remarks during opening statements.
- Premature admission of evidence that would be ultimately admissible is harmless error.

Expert overview—#12

Arizona and other jurisdictions that allow expert testimony to explain general behavioral characteristics of sexually victimized children—like delayed and piecemeal disclosure—draw the line at the expert offering an opinion that the charged victim's observed behaviors are consistent with having suffered sexual abuse. (See Outline, pp.11-13.)

Expert overview—#13

- *State v. Moran*, 151 Ariz. 378, 386 (1986):

"We hold that the trial court should not have admitted testimony that the victim's behavior was consistent with the abuse having occurred. Further, the court erred in permitting an expert to imply her belief of the daughter's veracity and in permitting the expert's 'personal opinion' that the daughter was telling the truth about the molestation and lying only about the extent of penetration. Such testimony was inadmissible under Rules 702 and 704."

Expert overview—#14

- *State v. Lindsey*, 149 Ariz. 472, 475 (1986):

"Thus, even where expert testimony on behavioral characteristics that affect credibility or accuracy of observation is allowed, experts should not be allowed to give their opinion of the accuracy, reliability or credibility of a particular witness in the case being tried. … Nor should experts be allowed to give similar opinion testimony, such as their belief of guilt or innocence. The law does not permit expert testimony on how the jury should decide the case."

Experts & Truth—#1

With increasing frequency, Dutton has given the following problematic testimony:

(1) malicious/false disclosure typically occurs in one of two scenarios—one of the child's parents prompts a false allegation during divorce or separation, or the child is an adolescent girl falsely accuses the household's male figurehead in an attempt to procure greater freedom or different living arrangements.

(2) False allegations of child molestation or abuse are "rare."

Such testimony TREADS on thin ice.

Experts & Truth—#2

"Arizona prohibits lay and expert testimony concerning the veracity of a statement by another witness," *State v. Boggs*, 218 Ariz. 325, 335 (2008), because opinion "testimony about the truthfulness or credibility of other witnesses invades the province of the jury," *State v. Martinez*, 230 Ariz. 382, 385 (App.2012), and such testimony is "nothing more than advice to jurors on how to decide the case." *State v. Moran*, 151 Ariz. 378, 383 (1986).

Experts & Truth—#3

Testimony that false allegations are rare among children who claim to be victims of sexual abuse runs afoul of this prohibition.

State v. Moran, 151 Ariz. 378, 382 (1986) ("Nor may the expert's opinion as to credibility be adduced indirectly by allowing the expert to quantify the percentage of victims who are truthful in their initial reports despite subsequent recantation.") (citing *State v. Myers*, 382 N.W.2d 91, 97 (Iowa 1986), for the proposition that it is "improper to admit expert testimony that children rarely lie about sexual abuse").

Experts & Truth—#4

- *State v. Tucker,* 165 Ariz. 340, 346 (App.1990) (“The expert may neither quantify nor express an opinion about the veracity of a particular witness or type of witness.”).

- *State v. Herrera*, 232 Ariz. 536, 551 (App.2013) (“Our supreme court disapproved of such testimony, holding that ‘trial courts should not admit direct expert testimony that quantifies the probabilities of the credibility of another witness.’”) (quoting *State v. Lindsey*, 149 Ariz. 473, 475 (1986).

- Other cases appear on pages 15-16 of the Outline.

Experts & Truth—#5

Herrera facts:

Dutton testified on direct false allegations "occur most commonly when the purported victims are either 'younger children whose parents are involved in a high-conflict divorce or custody dispute" or "adolescent females … driven by an 'ulterior motive or secondary gain.'"

Cross-examination—defense counsel asked whether teenage girls constitute the group of children most likely to make false allegations (victim was a teenager).

Experts & Truth—#6

(*Herrera* facts cont.):

Jury asked Dutton, "What percentage of allegations prove to be false?" and "What are the statistics of stepparents abusing stepchildren?" No defense objection." [Fundamental-error review.] *Responses:*

(1) "stepfathers are *often* the perpetrators" AND

(2) "false allegations occur less than 10% of the time," which did quantify the credibility of "witnesses of the type under consideration."

Experts & Truth—#7

State conceded that "testimony about the specific percentage of false sexual abuse allegations and the most common type of perpetrators of sexual abuse was error under the standard established in *Lindsey*."

Holding: "Dutton's testimony about the percentages of false accusations and rate of stepfather perpetrators was improper."

Experts & Truth—#8

Herrera: error not fundamental/prejudicial:

- Victim was a teenage girl—Dutton supported defendant's fabrication defense.
- No direct opinion on "the veracity of this particular victim," b/c Dutton blind expert.
- Jury instructed not bound by expert opinion.
- Dutton's testimony not sole basis for assessing victim's credibility.
- Overwhelming evidence of guilt.
- Acquittal on two counts show fair trial.

Experts & Truth—#9

State v. Buccheri-Bianca, 233 Ariz. 324, 332-33, ¶ 30 (App.2013):

[Although an] expert witness cannot be used to usurp the jury's fact finding function [*Lindsey*], Dutton's testimony in this case was sufficiently general to avoid running afoul of our supreme court's holding in *Lindsey*. Dutton testified that in her experience, "malicious false allegations" typically are made by "younger children whose parents are involved in a high-conflict divorce or custody dispute" or "teenage girls" who may use the allegation to seek some secondary gain. She did not state that any of the victims in this case should be believed or disbelieved; rather, she testified generally about factors that may prompt a child to falsely report molestation.

Experts & Truth—#10

Is the prosecutor prohibited from relying upon the expert's testimony while arguing that the victim is telling the truth? NO, but be careful!

- The general rule is that prosecutors may recite the trial evidence showing that the State's witnesses testified truthfully, and that the defendant lied. (See Outline, p.14.)

Experts & Truth—#11

- The safest and best approach is to rely upon the expert testimony as a way to counter specific charges against the victim's credibility. *See State v. Loney*, 230 Ariz. 542, 544-45, ¶¶ 8-13 (App.2012) (prosecutor properly relied upon expert's generalized testimony regarding the techniques used by sexual predators, including grooming, ridicule, and threats, to rebut defense counsel's closing remarks attacking the victim's credibility and her conduct with the defendant).
http://www.youtube.com/watch?v=dMH0bHeiRNg
(Evolution #1, 6:00)

Profile testimony—#1

What is “profile evidence”? Courts define it in varying terms such as an “informal compilation of characteristics often displayed by those trafficking in drugs” [citation omitted]; “an ‘abstract of characteristics found to be typical of persons transporting illegal drugs’” [citation omitted]; and “the collective or distilled experience of narcotics officers concerning characteristics repeatedly seen in drug smugglers” A profile is simply an investigative technique. It is nothing more than a listing of characteristics that in the opinion of law enforcement officers are typical of a person engaged in a specific illegal activity.

U.S. v. McDonald, 933 F.2d 1519, 1521 (10th Cir. 1991)

Profile testimony—#2

- *State v. Lee*, 191 Ariz. 542, 544, ¶ 10, (1998) ("Courts commonly describe drug courier profiles as an 'informal compilation of characteristics' or an 'abstract of characteristics' typically displayed by persons trafficking in illegal drugs.").
- *Ryan v. State*, 988 P.2d 46, 55 (Wyo.1999) ("Finding guilt by reference to common characteristics of a class of individuals to which one belongs raises the specter of profile evidence. Profile or syndrome evidence is developed through expert testimony and tends to classify people by their shared physical, emotional, or mental characteristics.").

Profile testimony—#3

Some courts have classified CSAAS as profile evidence.

W.R.C. v. State, 69 So.3d 933, 937-38 (Ala.Crim.App.2010) ("CSAAS is essentially a 'profile' of child sexual-abuse victims.");

L.C.H. v. T.S., 28 P.3d 915, 923-24 (Alaska 2001) ("The profile of a sexually abused child was first proposed by Dr. Roland Summit in 1983 as Child Sexual Abuse Accommodation Syndrome (CSAAS).

Profile testimony—#4

Not always prohibited:

Outside the suppression-hearing context, profile evidence may be admitted at trial: "(a) as background for a police stop and search; (b) as foundation for expert opinions; (c) to explain a method of operation; and (d) as rebuttal evidence." *State v. Lee*, 191 Ariz. 542, 545, ¶ 11 (1998).

Profile testimony—#5

Lee also states, "Notwithstanding these exceptions, a significant majority of jurisdictions have condemned the use of … profile evidence as substantive proof of guilt."

What does that mean?

Profile testimony—#6

The prosecution impermissibly uses a profile as substantive evidence of guilt with testimony:

- establishing the existence of a common profile for a certain class of persons;

- listing the profile's component characteristics for the jury; and

- comparing the profile's characteristics directly against those exhibited by the defendant on trial or the alleged victim.

Profile testimony—#7

United States v. Williams, 957 F.2d 1238, 1241 (5th Cir. 1992):

In addition to the plain language of the record, the case law demonstrates that the profile evidence was admitted as substantive evidence of guilt. During Officer Hughes's testimony, he described the profile itself and then proceeded to list the characteristics of the profile that Williams displayed. Other circuits have held that testimony expressly comparing an individual defendant's actions to a drug profile constitutes substantive evidence of guilt.

Profile testimony—#8

United States v. Quigley, 890 F.2d 1019 (8th Cir. 1989):

This point by point examination of profile characteristics with specific reference to [the defendant] constitutes use of the profile not as background to explain or justify an investigative stop, but as substantive evidence that [the defendant] fits the profile and, therefore, must have intended to distribute the cocaine in his possession.

Profile testimony—#9

- *State v. Cifuentes*, 171 Ariz. 257 (App.1991) ("Because defendant was Guatemalan and his possession of the Isuzu matched the profile developed by Tolan from 15 to 20 cases, the jury was invited to infer that defendant knew his Isuzu was stolen because it was part of a Guatemalan car theft ring.")

Profile testimony—#10

- *State v. Percy*, 507 A.2d 955, 960 (Vt.1986):

"Profile or syndrome evidence is evidence elicited from an expert that a person is a member of a class of persons who share a common physical, emotional, or mental condition. See generally 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 401[10], at 88-91 (1985). The expert witness is typically asked to describe the general phenomena and characteristics of the condition at issue, and to give his opinion that the person is suffering from such condition."

Profile testimony—#11

The prohibition against using profile evidence testimony means that the State may not have its expert testify that the typical sexually abused child possesses a certain constellation of characteristics, list these traits for the jury, compare the charged victim against this set of traits, and thereafter conclude that the victim had in fact been sexually abused.

Profile testimony—#12

Rationales for precluding profile evidence:

- Such evidence constitutes "group character evidence" prohibited by Arizona Rules of Evidence 403 and 404(a) and consequently "creates too high a risk that a defendant will be convicted not for what he did but for what others are doing." *State v. Cifuentes*, 171 Ariz. 257, 258 (App.1991) (collecting cases).

Profile testimony—#13

Rationales for precluding profile evidence:
Lack of relevance. Insofar CSAAS is concerned:

Dr. Summit did not intend that this "syndrome" would be *used to diagnose—that is, identify—sexually abused children or deduce the commission of sexual abuse from overt behavior*. Rather, CSAAS assumes that the particular child at issue had been abused and endeavors to facilitate treatment of these persons by identifying the wide range of behaviors reportedly found among members of this sub-category of sexually victimized persons.

Profile testimony—#14

Courts have doubted whether a profile for sexually abused children even exists, given dissent among behavioral scientists about which symptoms indicate whether a certain child has been sexually abused.

See State v. Cressey, 628 A.2d 696, 700 (N.H.1993): "The consensus among scholars is that there are as yet no scientifically reliable indicators of child sexual abuse."

Profile testimony—#14A

"… There are no symptoms or behaviors that occur in every case of child abuse, nor are there symptoms or behaviors that are found exclusively in child abuse cases. … Many of the symptoms considered to be indicators of sexual abuse, such as nightmares, forgetfulness, and overeating, could just as easily be the result of some other problem, or simply may be appearing in the natural course of the children's development."

Profile testimony—#15

Good News: Even in those jurisdictions that prohibit the admission of CSAAS profile evidence for the purpose of proving that a certain child had been sexually abused, the prosecution may offer expert testimony regarding the behaviors commonly found in child sex-crime victims in order to show that the charged victim's conduct, such as delayed or piecemeal disclosure, does not render his or her allegations of sexual abuse incredible.

See Outline, pp.25-27 for cases.

Profile testimony—#16

Recommendations re: sexually abused children:

- CONTINUE presenting blind expert testimony that debunks the common misperceptions about counterintuitive behaviors, such as delayed and piecemeal disclosure and recantations.
- AVOID asking the expert about whether the victim's conduct is consistent with him or her having been sexually abused.
- CONTINUE presenting testimony that there is no profile for sexually abused children, and that their reactions and behaviors are varied.

Profile testimony—#17

Recommendations: sexually abused children:

- AVOID asking the expert hypothetical questions (on direct examination) that mirror the facts of the victim in the case at bar, or questions that deal with the victim specifically.
- If cross-examination challenges certain particular aspects of the victim's conduct, your redirect examination may properly cover the specific acts and omissions that were challenged by the defense.

Profile testimony—#18

Recommendations: sexually abused children:

- Because the experts cannot offer testimony comparing the victim against a profile in to establish the commission of the charged sexual offense, DO NOT ARGUE that the victim fit the profile of being sexually abused.

- Instead, LIMIT closing remarks to the specific behaviors that the defense identified as reasons to disbelieve the witness and cite the expert's testimony that such conduct has been reported in other sex-crime victims.

Profile testimony—#19

Note that the defense bar often attempts to conflate inadmissible profile evidence with proper expert testimony regarding the modus operandi used by criminals to commit certain offenses. Federal and state courts have resoundingly held that "government agents or similar persons may testify to the general practices of criminals to establish the defendants' *modus operandi*." *United States v. Gil*, 58 F.3d 1414, 1422 (9th Cir. 1995).

Profile testimony—#20

See State v. Kevil, 111 Ariz. 240, 247 (1974) (expert testimony regarding modus operandi of "role jobs" upheld).

State v. Gonzalez, 229 Ariz. 550, 553-55 ¶¶ 13-19 (App.2012) (collecting cases distinguishing profile and *modus operandi* evidence).

Outline pages 28-32.

Profile testimony—#21

Numerous courts have upheld expert testimony regarding the *modus operandi* employed by child molesters to groom and abuse their victims.

See United States v. Batton, 602 F.3d 1191, 1200-02 (10th Cir. 2010); *United States v. Hitt*, 473 F.3d 146, 158 (5th Cir. 2006); *United States v. Hayward*, 359 F.3d 631, 636-37 (3rd Cir. 2004); *United States v. Long*, 328 F.3d 655, 665-68 (D.C. Cir. 2003); *United States v. Romero*, 189 F.3d 576, 584-85 (7th Cir. 1999); *United States v. Cross*, 928 F.2d 1030, 1050 n.66 (11th Cir. 1991); *Jones v. United States*, 990 A.2d 970, 978 (D.C.App.2010); *Morris v. State*, 361 S.W.3d 649, 669 (Tex.Crim.App.2011).

Break

- http://www.youtube.com/watch?v=Qamxu3pdJf8 (Angry Family. 1:29)

  http://www.youtube.com/watch?v=dp4u3zHabJg (Debra. 2:10)

Rule 702–#1

Arizona Rule of Evidence 702 now reads as follows:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 702–#2

Because Arizona Rule of Evidence 702 is identical to its federal counterpart, Arizona courts will consult federal precedent and deem it “instructive” and “persuasive” authority.

Rule 702–#3

Logic dictates that this rule extends to the Comment to the 2000 Amendment to Federal Rule of Evidence 702 to codify the *Daubert/Joiner/Kumho* trilogy.

Certain passages from the Federal Comment are pertinent to expert testimony presented by behavioral experts:

Rule 702—#4

Daubert's factors apply to non-scientific experts, despite the following text in the Federal Comment:

The specific factors explicated by the *Daubert* Court are (1) whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; …

Rule 702–#4A

Comment:

… (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.

Rule 702–#5

Fed. Comment (cont'd):

Daubert itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific *Daubert* factors can apply to every type of expert testimony. In addition to Kumho, 119 S.Ct. at 1175, *see Tyus v. Urban Search Management*, 102 F.3d 256 (7th Cir. 1996) (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist).

Rule 702–#6

Daubert did not work a "sea change over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996). As the Court in *Daubert* stated: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 595.

Rule 702–#7

This part of the fed. comment applies to blind expert testimony offered to EDUCATE the jury:

"Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, **without ever knowing about or trying to tie their testimony into the facts of the case**.

…

Rule 702–#8

Comment cont'd:

"...*The amendment does not alter the venerable practice of using expert testimony to educate the fact-finder on general principles*. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case."

Rule 702–#9

The new standard envisions allowing expert testimony by non-scientific law enforcement personnel:

"For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities.

The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted. …

Rule 702–#10

"Nothing in this amendment is intended to suggest that experience alone—or experience in conjunction with other knowledge, skill, training or education—may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. *See, e.g., United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail)."

Rule 702–#11

Caveat:

"If the witness is relying solely or primarily on experience, then *the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion*, and how that experience is reliably applied to the facts. The trial court's gate-keeping function requires more than simply 'taking the expert's word for it.'" (Emphasis added.)

Rule 702–#12

The ASC's comment to the 2012 amendment to Arizona's Rule 702 also contains support for admitting experience-based expert testimony like Dutton's:

The 2012 amendment of Rule 702 adopts Federal Rule of Evidence 702, as restyled. The amendment recognizes that trial courts should serve as gatekeepers in assuring that proposed expert testimony is reliable and thus helpful to the jury's determination of facts at issue. …

Rule 702–#13

Ariz. Comment (Continued):

… The amendment is not intended to supplant traditional jury determinations of credibility and the weight to be afforded otherwise admissible testimony, nor is the amendment intended to … preclude the testimony of experience-based experts…

Rule 702–#14

The consequence of the 2012 amendment to Rule 702 is the death knell of Arizona's former hybrid regime for scientific and experience-based expert testimony set forth in *Logerquist v. McVey*, 196 Ariz. 470 (2000) and *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

If any doubt remained, the Arizona Court of Appeals held that Rule 702 and *Daubert does apply* to mental health expert testimony, albeit in the context of a discharge hearing under SVPA. *See Arizona State Hosp. v. Klein*, 231 Ariz. 467, 473-74, ¶¶ 26-32 (App. 2013).

Rule 702–#15

The Arizona Court of Appeals upheld the admission of Wendy Dutton's testimony against *Daubert* challenges twice in 2013:

State v. Salazar-Mercado, 232 Ariz. 256, 259-63 (App.2013), REVIEW GRANTED on February 11, 2014.

State v. Buccheri-Bianca, 233 Ariz. 324, 331-33 (App.2013), REVIEW DENIED on February 11, 2014.

Rule 702–#16

Arguments *rejected* in *Salazar-Mercado*: Because Dutton was a blind expert, her testimony was general and therefore never directly applied her methodology to the case's facts.

Rationale: Comment to Federal Rule 702 states: "Yet it might also be important in some cases for an expert to educate the fact-finder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the fact-finder on the principles of thermodynamics, or blood-clotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case."

Rule 702–#17

Comment (continued):

Therefore, Federal Rule 702 “does not alter the venerable practice of using expert testimony to educate the fact-finder on general principles.” Id. Rather, for this “generalized” testimony to be admissible the rule “simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the fact-finder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony ‘fit’ the facts of the case.” Id.

Rule 702–#18

- Dutton was found qualified as expert on child sex-crime victim behavior by prior cases, *i.e., State v. Curry*, 187 Ariz. 623, 628-29 (App.1996).

- Testimony would assist the jurors—not familiar with behavioral characteristics of sex-crime victims—COA reasoned ASC did not overrule *Lindsey/Moran* by amending Rule 702.

Rule 702–#19

COA rejected Defendant's argument Dutton's testimony was not product of reliable principles and methods because it was based on various research studies and her own experience. Not possible to perform potential/actual error rate.

Why? Because Rule *702/Daubert:*

- sets forth a flexible standard and requires error-rate analysis only when relevant.
- was "not intended to prevent expert testimony based on experience"

Rule 702–#20

The State satisfied requirement that Dutton's expert testimony "fit" facts of case.

Federal precedent and the Comment allow such testimony when the proffered expert testimony assists the jury "by providing it with relevant information, necessary to a reasoned decision of the case."

Rule 702–#21

Buccheri-Bianca relied on *Salazar-Mercado* to reject arguments that Dutton's testimony was:

- Unreliable because her methods were non-scientific and not subject to error-rate analysis.
- Not helpful to the jury because it was general

GOOD SIGN that ASC denied review here.

Rule 702–#22

Other jurisdictions have upheld expert testimony regarding the behavioral characteristics of child-molestation victims against *Daubert* challenges to the reliability of the proffered testimony.

- United States v. Bighead, 128 F.3d 1329, 1330-31 (9th Cir. 1997) ("script memory" and "delayed disclosure");
- State v. Greene, 951 So.2d 1226, 1237-28 (La.App.2007) (delayed disclosure by a doctor qualified in forensic pediatrics and child abuse);
- State v. Edelman, 593 N.W.2d 419, 422-23, ¶¶ 8-18 (S.D.1999) (upholding general testimony regarding CSAAS to explain behaviors of child sex-crime victims).

Rule 702–#23

Significantly, *Daubert* is ***not*** satisfied when the prosecution offers CSAAS evidence to prove that the charged victim had been abused because she/he possesses the same characteristics as other abused children. Hardly surprising because

- Dr. Summit himself declared that CSAAS was not intended to diagnose/identify sexually abused children; and
- No consensus exists about what characteristics will be found to exist in sexually-abused children.

Rule 702–#24

DO NOT FEAR: Courts that follow *Daubert* still allow expert testimony like Dutton's regarding the behaviors of child sex-crime victims.

See Steward v. State, 652 N.E.2d 490, 498-99 (Ind.1995) (allowing expert testimony to explain the victim's counterintuitive behaviors attacked by the defendant because "research generally accepted as scientifically reliable recognizes that child victims of sexual abuse may exhibit unexpected behavior patterns seemingly inconsistent with the claim of abuse"). *Accord State v. Foret*, 628 So.2d 1116, 1222-30 (La.1992); *State v. Chamberlain*, 628 A.2d 704, 706-07 (N.H.1993).

Rule 702–#25

Many courts have also upheld expert testimony regarding *modus operandi* of child molesters against *Daubert* attack:

U.S. v. Batton, 602 F.3d 1191, 1200-02 (10th Cir. 2010); *U.S. v. Hitt*, 473 F.3d 146, 158 (5th Cir. 2006); *U.S. v. Long*, 328 F.3d 655, 665-68 (D.C. Cir. 2003); *U.S. v. Romero*, 189 F.3d 576, 584-85 (7th Cir. 1999); *Jones v. U.S.*, 990 A.2d 970, 978 & n.30 (D.C.App.2010); *Morris v. State*, 361 S.W.3d 649, 672 n.9 (Tex. Crim.App.2011) (Cochran, J., concurring).

Rule 702–#26

Other experience-based law enforcement expert testimony has passed *Daubert.* Examples:

- *United States v. Wilson*, 484 F.3d 267, 273-77 (4th Cir. 2007) (drug code words).

- *United States v. Bynum*, 604 F.3d 161, 167-68 (4th Cir. 2010) (upholding expert testimony of experienced forensic or medical professionals that alleged child pornography depicted actual children).

Rule 702–#27

- *United States v. Hankey*, 203 F.3d 1160 1167-70 (9th Cir. 2000) (gang "code of silence"); and

- *United States v. Two Elk*, 536 F.3d 890, 903-04 (8th Cir. 2008) (*Daubert* allowed medial expert testimony regarding whether the charged molestation victim's genital injuries were "acute").

Rule 702–#28

The upshot:

ASC will decide whether Dutton satisfies *Daubert* in 2014.

What we do know:

- *Daubert* will pose a problem when the State offers CSAAS expert testimony to prove the charged offense by showing that the charged victim exhibits the same traits or behaviors as other sexually abused children, due to the unreliability of applying CSAAS to diagnose sexual abuse.

Rule 702–#20

- Other courts have held that *Daubert* and *Kumho* permit blind expert testimony that certain behaviors—like delayed disclosure and recantations—are common among sexually abused children. The implicit rationale is that the expert's testimony is permissible because of his repeated exposure to the phenomenon at issue during the course of his professional work.

RAPE SHIELD STATUTE A.R.S. § 13-1421(A)

Rape Shield—#1

The outline that was provided to you relates more data than we will be covering here today. For use during future litigation, a brief overview of the written materials will follow so that you know what information you can find.

- Historical development of rape-shield doctrine in Arizona (Outline, pp.1-34).
- Federal constitutional law re: preclusion of defense evidence (*id.* at 17-21).
- Separation of powers law (*id.* at 21-29).
- Justifying A.R.S. § 13-1421 under the Victims' Bill of Rights (*id.* at 28-29).

Rape Shield—#2

1. *Pope v. Superior Court*, 113 Ariz. 22 (1973):

- overruled rule that chastity is probative of truthfulness;

- established a notice-and-hearing requirement;

- identified six illustrative exceptions to the shield's protection: (1) false allegations against others; (2) prior consensual sexual intercourse with the defendant; (3) source of loss of virginity, semen, disease, or pregnancy; (4) defendant's mental state when an element of crime; (5) rebut claims of victim's chastity; and (6) prior acts of prostitution. 113 Ariz. at 29.

Rape Shield—#3

2. *State v. Oliver*, 158 Ariz. 22 (1988):

- extended rape-shield protection to child molestation victims;
- recognized that *Pope's* list of exceptions to the rape shield was not exhaustive;
- recognized an exception for sexual history that could provide victims with sufficient sexual knowledge to fabricate allegations against the defendant; and
- held that Rules 401-403 the admissibility of defense rape-shield evidence. (Outline, pp.4-12.)

Rape Shield—#4

State v. Oliver, 158 Ariz. 22 (1988), which (cont'd):

- encouraged judges to admit probative evidence, but take measures to sanitize source of sexual knowledge to avoid undue embarrassment;
- upheld judge's Rule 403 preclusion of marginally probative sexual history evidence; and
- recognized that a defendant's right to confront witnesses and present defense evidence is not unlimited, and that defendants therefore have no constitutional right to introduce evidence that is irrelevant or inadmissible under evidentiary rules.

Rape Shield—#5

3. *State v. Lujan*, 192 Ariz. 448 (1998):

- reiterated that *Pope* did not promulgate an exhaustive list of exceptions to the rape shield;
- observed that *Oliver* recognized an exception not listed in *Pope*;
- reversed the defendant's child molestation conviction because the court precluded (1) proof that another man had sexually abused the victim before the charged incident and (2) expert testimony that severely abused children might misconstrue innocent physical contact as sexual;

Rape Shield—#6

State v. Lujan, 192 Ariz. 448 (1998):

- found the trial judge's Rule 403 balancing defective because the victim would not be prejudiced in the jury's eyes for having been abused before; and

- held that the evidence at issue was not barred by the rape shield because it supported the defense theory that the victim's perception of defendant's conduct was incorrect.

(Outline, pp.12-15.)

Rape Shield—#7

4. The enactment of the rape shield statute, Section 13-1421, in 1998. Subsection (A) states:

"Evidence relating to a victim's reputation for chastity and opinion evidence relating to a victim's chastity are not admissible in any prosecution for any offense in this chapter."

"Evidence of specific instances of the victim's prior sexual conduct may be admitted *only if* a judge finds the evidence is *relevant and is material to a fact in issue in the case* and that *the inflammatory or prejudicial nature of the evidence does not outweigh the probative value of the evidence*, and *if the evidence is one of the following*:

Rape Shield—#8

A.R.S. § 13-1421(A) (continued):

(1) Evidence of the victim's past sexual conduct with the defendant.

(2) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease or trauma.

(3) Evidence that supports a claim that the victim has a motive in accusing the defendant of the crime.

(4) Evidence offered for the purpose of impeachment when the prosecutor puts the victim's prior sexual conduct in issue.

(5) Evidence of false allegations of sexual misconduct made by the victim against others.

Rape Shield—#9

Sect. 13-1421(B) codified *Pope's* notice-and-hearing requirement:

- "Evidence described in subsection A shall not be referred to in any statements to a jury or introduced at trial without a court order after a hearing on written motions is held to determine the admissibility of the evidence. If new information is discovered during the course of the trial that may make the evidence described in subsection A admissible, the court may hold a hearing to determine the admissibility of the evidence under subsection A."

- "The standard for admissibility of evidence under subsection A is by clear and convincing evidence."

Rape Shield—#10

5. *State v. Gilfillan*, 196 Ariz. 396 (App.2000), which:

- involved the trial court's preclusion of evidence that the child victim, whom the defendant had beat, restrained, sodomized, and attempted to vaginally penetrate, had allegedly accused a neighborhood boy of raping her;
- challenged the trial court's ruling that the defendant had not proven the applicability of § 13-1421(A)(5)'s false-allegation exception by clear and convincing evidence;

Rape Shield—#11

State v. Gilfillan, 196 Ariz. 396 (App.2000), which (cont'd):

- rejected the defendant's argument that the statute was unconstitutional because it violated his federal constitutional rights to present a defense, confront witnesses, and due process;

- recognized Supreme Court precedent holding that these rights may be limited by other legitimate interests in the criminal trial process, including by rape shield statutes, which protect victims against surprise, harassment, and unnecessary invasions of privacy;

Rape Shield—#12

State v. Gilfillan, 196 Ariz. 396 (App.2000), which (cont'd):

- observed that the statute did not "absolutely" deny defendants an opportunity to present victim sexual-history evidence, but set up a mechanism to assess the admissibility of such evidence on a case-by-case basis;
- rejected the defendant's argument that 13-1421(B)'s clear and convincing evidence standard violated the state constitution's separation of powers clause;
- reasoned that the statute did not conflict with, but instead complemented the rules of evidence, by promulgating the CCE standard.

(Outline, at 15-28.)

Rape Shield—#13

6. *State ex rel. Montgomery v. Duncan* (Fries), 228 Ariz. 514 (App.2011), which:

- stemmed from a special-action petition filed by the State after Judge Duncan ruled that the rape-shield statute did not prohibit the defendant (charged with having oral sex with a 15 year old boy) from offering evidence that the boy had reported having oral sex with others—allegedly to bolster the defense under A.R.S. 13-1407(B) that he reasonably believed the victim was over 18—a rationale <u>not</u> falling within A.R.S. 13-1421(A)(1)-(5)'s exceptions;

Rape Shield—#14

State ex rel. Montgomery v. Duncan (Fries), 228 Ariz. 514 (App.2011) (cont'd):

- overruled Judge Duncan's determination that the rape shield statute allowed the sexual-history evidence for the purpose that defendant advanced. Instead, the court of appeals found the statute to preclude the evidence for not falling within one of the five listed exceptions;

Rape Shield—#15

State ex rel. Montgomery v. Duncan (Fries), 228 Ariz. 514 (App.2011), which (cont'd):

- proceeded to determine whether the statute, as applied, was constitutional;
- construed *Gilfillan* as upholding the statute on an as-applied basis and not as holding that preclusion of evidence under the statute was constitutional *per se*;
- indicated that preclusion under the rule could be unconstitutional if the defense evidence "has substantial probative value" and "alternative defense evidence tending to prove the issue is not reasonably available";

Rape Shield—#16

State ex rel. Montgomery v. Duncan (Fries), 228 Ariz. 514 (App.2011), which (cont'd):

- although Judge Duncan found the proffered evidence relevant, she had not determined whether the evidence had "substantial probative value" and whether defendant had access to other evidence on that point. Remand.
- ruled that the defendant could *not cross-examine the victim* about his prior sexual activities to prove the defendant's belief that he was over 18—the appropriate inquiry instead was whether *the defendant* could testify about the victim's statements about his sexual past.

(Outline, pp.29-34.)

Frias: the rest of the story

- Remand: Judge Duncan precluded the victim history evidence. Convicted.
- No constitutional violation because:
- (1) evidence not relevant b/c defendant failed to show how/why sexual history relevant to his belief that the boy was over 18; and
- (2) defendant had other evidence available to prove his belief that victim over 18.

Rape Shield—#17

7. *State v. Dixon*, 226 Ariz. 545 (2011), which:

- reviewed the trial court's preclusion of evidence, pursuant to A.R.S. § 13-1421, that the murder/rape victim had written a diary entry reporting having been sexually assaulted in Europe several years earlier and vowing to protect herself with a knife—evidence the defendant argued would have proven he never tried to rape her because she did not stab him; and

- upheld preclusion because the evidence had minimal probative value AND the defendant's proposed use of the evidence fell outside the rape shield statute's five exceptions. (Outline, pp.33-34.)

Rape Shield—#18

The question: Can the trial court preclude sexual-history evidence offered for a purpose not enumerated by A.R.S. § 13-1421(A)(1)-(5) without violating:

(1) the Arizona constitution's separation of powers clause, which confers upon the Arizona Supreme Court preeminent power to promulgate procedural rules, such as the Arizona Rules of Evidence; and

(2) the defendant's right to present a defense and cross-examine witnesses under the federal constitution?

Rape Shield—#19

Separation of powers question:

- Arizona Constitution Article III provides that the legislative, executive and judicial departments "shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to the others."

- Arizona Constitution Article VI, § 5(5) endows the Arizona Supreme Court with the "power to make rules relative to all procedural matters in any court."

Rape Shield—#20

- "Rules of evidence 'have generally been regarded as procedural in nature.'" *Seisinger v. Siebel*, 220 Ariz. 85, 88, ¶ 7 (2009) (quoting *State ex rel. Collins v. Seidel*, 142 Ariz. 587, 590 (1984)). Accord *Lear v. Fields*, 226 Ariz. 226, 230, ¶ 7 (App.2011).

- However, "a statutory procedural enactment is not automatically invalid," and "the legislature and this Court both have rulemaking power, but that in the event of irreconcilable conflict between a procedural statute and a rule, the rule prevails." *Seisinger.*

Rape Shield—#21

- The Legislature infringes upon judicial rule-making authority by enacting statutes that implements ***a standard for admission contrary to the rules of evidence***. *See Lear v. Fields*, 226 Ariz. 226, 230-33, ¶ 9-19 (App.2011) (holding that A.R.S. § 12-2203 conflicted with Arizona Rule of Evidence 702 by implementing the *Daubert* standard for admitting expert testimony that the Arizona Supreme Court had explicitly repudiated in *Logerquist*).

Rape Shield–#22

- "Before finding a statute unconstitutional, a court not only must find the statute conflicts with a rule but that the statute is procedural rather than substantive in nature." *Lear v. Fields*, 226 Ariz. 226, 230, ¶ 24 (App.2011). Accord Seisinger v. Siebel, 220 Ariz. 85, 92, ¶ 24 (2009) ("[W]hen a statute and a rule conflict, we traditionally inquire into whether the matter regulated can be characterized as substantive or procedural, the former being the legislature's prerogative and the latter the province of this Court.").

Rape Shield—#23

- "[T]he substantive law is that part of the law which creates, defines and regulates rights; whereas the adjective, remedial or procedural law is that which prescribes the method of enforcing the right or obtaining redress for its invasion." *State v. Birmingham*, 96 Ariz. 109, 110 (1964). *See also State v. Fletcher*, 149 Ariz. 187, 191-93 (1986) (burden of proof for affirmative defense of insanity is a matter of substantive law within the legislature's domain).

Rape Shield—#24

- Article 4, Part 1, Section 1 of the Arizona Constitution confers the Legislature with the power to declare substantive law, the consequence of which is that a statute will trump any conflicting judicially-created substantive law.

Examples: *State v. Cheramie*, 218 Ariz. 447, 449, ¶ 9 (2008) ("The legislature defines crimes and their elements, and courts may not add elements to crimes defined by statute.") *State v. Mott*, 187 Ariz. 536, 541 (1997) (holding that the Arizona Supreme Court lacks constitutional authority to adopt the diminished capacity defense)/

Rape Shield—#25

Why we have a potential separation of powers problem:

- Before the enactment of A.R.S. § 13-1421, the Arizona Supreme Court issued three decisions (*Pope*, *Oliver*, and *Lujan*) that unequivocally declared that exceptions beyond the five listed in the rape-shield doctrine exist—the victim's ability to fabricate sexual allegations because of exposure to or participation in sexual activity (Oliver); victim hypersensitivity due to prior sex abuse (Lujan); defendant's state of mind, (all three); victim's acts as a prostitute (Pope), etc.

Rape Shield—#26

Why we have a potential separation of powers problem:

- In *Oliver*, the Arizona Supreme Court held that the admissibility of evidence of the victim's sexual history must be determined pursuant to Rules 401 through 403—rules that require admission of relevant evidence whose probative value is not substantially outweighed by the factors listed in Rule 403.

(Outline, pp.35-38.)

Rape Shield—#27

Potential counterargument : Arizona Constitution Article II, § 2.1(D) provides, "The *legislature*, or the people by initiative or referendum, have *the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section*, including the authority to extend any of these rights to juvenile proceedings." (Emphasis added.)

The Victim's Bill of Right's first provision guarantees victims the right "to be treated with fairness, respect, and dignity, and to be *free from intimidation, harassment, or abuse, throughout the criminal justice process*." Ariz. Const. art. II, § 2.1(A) (emphasis added).

Rape Shield—#28

These constitutional objectives are the very raison d'être of rape-shield statutes.

- *Lucas v. Michigan*, 500 U.S. 145, 146 (1991) ("The Michigan statute represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy.");.

- *State v. Gilfillan*, 196 Ariz. 396, 400-01, ¶ 15 (App.2000) ("Like the majority of states, Arizona has enacted a statute intended to protect victims of rape from being exposed at trial to harassing or irrelevant questions concerning any past sexual behavior."). See Outline, pp.28-29, for many additional cases.

Break

http://www.youtube.com/watch?v=FZb4jBE0Gr0

(Allie's question, 4:23)

Rape Shield—#29

Next problem: The categorical preclusion of victim-sexual-history evidence for not falling within one of the five exceptions set forth in A.R.S. § 13-1421(A)(1)-(5) could also constitute the basis for the defense argument that such categorical, *per se* preclusion deprives the defendant of his *federal const. rights* to present a defense, confrontation, and due process.

Rape Shield—#30

The Supreme Court has found violations of these constitutional rights in cases in which defense evidence had been subject to wholesale preclusion as the result of the mechanistic application of "evidence rules that 'infringe upon a weighty interest of the accused' and are 'arbitrary' or 'disproportionate to the purposes they were designed to serve.'" *Holmes v. South Carolina*, 547 U.S. 319, 324-25 (2006) (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (quoting *Rock v. Arkansas*, 483 U.S. 44, 58 (1987)).

Rape Shield—#31

The Supreme Court defined "arbitrary" rules as those "rules that excluded important defense evidence but did not serve any legitimate interests." *Holmes*, 547 U.S. at 325. The five cases listed on pages 38-39 of the Outline (*Holmes, Rock, Crane, Chambers, and Washington*) all involved arbitrary rules that categorically precluded important defense evidence at criminal trials.

Rape Shield—#32

The upshot: The State's ability to offer a rational justification for limiting the defendant to just the five rape-shield exceptions enumerated in A.R.S. § 13-1421(A)(1)-(5) will be significantly compromised by *Lujan, Oliver, Pope, and Castro*, wherein Arizona courts recognized several other exceptions to the rape-shield doctrine and repeatedly indicated the possibility that yet other exceptions might exist.

The courts might also find this categorical limitation of victim-sexual-history evidence to be inequitable in light of Arizona's Rule 404(b) jurisprudence, which recognizes that the list of non-character purposes for admitting other-act evidence against the defendant is not exhaustive, but illustrative. See, e.g., State v. Wood, 180 Ariz. 53, 62 (1994).

Rape Shield—#33

Let's commence our thinking about countermeasures by recognizing that Arizona's rape-shield statute is essentially an evidentiary rule—albeit one promulgated by our Legislature—that concerns a special class of witnesses (victims) and preconditions the admission of evidence of the victim's sexual conduct, for one of five specific purposes, upon the defendant's satisfaction of the traditional requirements of relevance and probative value exceeding the potential for unfair prejudice. *Cf. Agard v. Portuondo*, 117 F.3d 696, 703 (2nd Cir. 1997) ("In this respect, rape shield laws are an example of the court's traditional power to exclude evidence the prejudicial character of which far exceeds probative value.").

Rape Shield—#34

Consequently, when the defendant seeks to offer evidence pursuant to one of the statute's five enumerated rape-shield exceptions, but falls short of satisfying all of the statute's procedural prerequisites for admissibility, appellate courts will uphold the trial court's preclusion order against federal constitutional challenges alleging violations of his rights to due process, confrontation, and the presentation of a defense, except in very rare and extreme circumstances. (Outline, pp.40-41 & nn.1-2.)

Rape Shield—#35

Proposed solution to both constitutional problems: Rely upon Rules 401-403 as the controlling standard.

- This approach avoids the conflict between (1) the statute recognizing just five rape-shield exceptions and (2) Arizona Supreme Court precedent recognizing that other exceptions to the rape-shield doctrine exist, and that Rules 401, 402, and 403 should be used to determine the admissibility of such evidence (*i.e.*, *Lujan*, *Oliver*, and *Pope*).

Rape Shield—#36

- When the defendant seeks to offer evidence pursuant to a non-statutory exception recognized by Arizona's case law, the State should cite precedent from Arizona (and, if necessary, other jurisdictions) concerning that common-law rape-shield exception.

- Application of Rules 401, 402, and 403 also negates the possibility that the conviction will be reversed on the federal constitutional ground that the statute required a "mechanistic" or "wholesale" exclusion of all sexual-history evidence falling outside A.R.S. § 13-1421's five narrow exceptions.

Rape Shield—#37

- Resort to the broader and more fact-intensive standards set forth in Rules 401-403 will remove this type of case from the parameters of cases that mandated reversal for the wholesale exclusion of entire categories of evidence (*i.e.*, *Holmes, Crane, Rock, Chambers, and Washington*) and place it squarely within precedent explicitly acknowledging the constitutionality of precluding evidence that is marginally relevant, unduly prejudicial, cumulative, likely to cause juror confusion or delay, or otherwise not compliant with the forum's evidentiary rules (*Scheffer, Egelhoff, Lucas, Taylor, Van Arsdalli, Prasertphong, Dickens, Oliver, and Davis*).

Rape Shield—#38

Demonstrating that the proffered evidence is marginally relevant and subject to exclusion under Rule 403 also satisfies the first of the two-part inquiry that the Arizona Court of Appeals articulated for finding the rape-shield statute constitutional "as applied" in *Duncan (Fries*):

whether the federal constitution requires the statutorily-barred evidence to be admitted anyway because it "has substantial probative value." 228 Ariz. at 516, ¶ 5 (quoting *State v. Gilfillan*, 196 Ariz. 396, 403, ¶ 22 (App.2000)).

Rape Shield—#39

The second countermeasure—one that addresses only the federal constitutional provisions—is to demonstrate that preclusion of the proffered evidence does not prejudice the defendant because "alternative evidence tending to prove the issue is [nonetheless] reasonably available." *Duncan (Fries)*, 228 Ariz. at 516, ¶ 5 (quoting *Gilfillan*, 196 Ariz. at 403, ¶ 22).

Solution: Make sure that the record reflects all of the alternative evidence that the defendant could offer that collectively or individually has as much or greater probative value than the precluded victim-sexual-history evidence.

Rape Shield—#40

If no equivalent alternative defense evidence exists, the prosecution should propose ways to let the defendant present the jury with the desired information in a manner that fulfills his objective, but which minimizes the potential of embarrassing or humiliating the victim.

The Arizona Supreme Court endorsed this practice in *Oliver*, where the prosecutor used leading questions to establish that the victim was familiar with ejaculation and seminal fluid. 158 Ariz. at 29-30.

Rape Shield—#41

Keep in mind the standard for satisfying the Confrontation Clause. See Outline, pp.43-44 for cases:

"A defendant's confrontation rights are satisfied when the cross-examination permitted exposes the jury to facts sufficient to evaluate the credibility of the witnesses and enables defense counsel to establish a record from which he can properly argue why the witness is less than reliable." *Mills v. Singletary*, 161 F.3d 1273, 1288 (11th Cir. 1998); *see also State v. Bracy*, 145 Ariz. 520, 533 (1985) (test of reasonable limit on cross-examination is whether jury is otherwise in possession of sufficient information to assess the bias and motives of the witness).

Rape Shield—#42

- Evolution of Dance II (4:11)
  http://www.youtube.com/watch?v=inLBPVG8oEU

Rape Shield—#43

How to win the Rule 401/403 battle to preclude evidence of the victim's sexual history:

- Demonstrate that the defendant cannot lay the foundation for the questions he wishes to ask the victim because the basis for his inquiries are hopeful speculation, surmise, and conjecture. (Outline, pp.44-45.)

Rape Shield—#44

"One salubrious limitation that courts have developed holds that a party who seeks to cross-examine a witness for the purpose of impeaching his credibility cannot base his queries solely on hunch or innuendo." *United States v. Zaccaria*, 240 F.3d 75, 81 (1st Cir. 2001).

"It is well established that purely conjectural or speculative cross-examination is neither reasonable nor appropriate." *Searcy v. Jaimet*, 332 F.3d 1081, 1088 (7th Cir. 2003) (collecting cases).

Rape Shield—#45

Arizona courts have applied this rule while precluding speculative cross-examination in various contexts:

- *State v. Riggs*, 189 Ariz. 327, 331 (1997) (precluding impeachment of victims with their invocation of right to refuse a defense interview absent "some showing that the victims refused the interviews for a reason or a manner bearing on their credibility")
- .
- *State v. Zuck*, 134 Ariz. 509, 513 (1982) ("We hold that before psychiatric history of a witness may be admitted to discredit him on cross-examination, the proponent of the evidence must make an offer of proof showing how it affects the witness's ability to observe and relate the matters to which he testifies.").

Rape Shield—#46

- *State v. Adams*, 155 Ariz. 117, 122 (App.1987) (upholding preclusion of cross-examination into whether victim had stolen defendant's vehicle where "counsel simply raised the inference of theft and presented no evidence to support it" and was thus "essentially asking to be allowed to question the witness by innuendo, which is prohibited").

- *State v. Riley*, 141 Ariz. 15, 20-21 (App.1984) ("Here, the defendant presented no offer of proof indicating that Harris received any special consideration by the police as a result of being an informant. ... Under these circumstances, we can find no abuse of discretion by the trial court in refusing to permit defense counsel to, in effect, go on a fishing expedition...").

Rape Shield—#47

"Speculative or unsupported allegations are insufficient to tip the scales in favor of a defendant's right to present a defense and against the victim's rights under the rape shield statute." *State v. Johnson*, 958 P.2d 1182, 1186, ¶ 24 (Mont.1998).

State v. Holley, 123 Ariz. 382, 384-85 (App.1979) (upholding preclusion of cross-examination into victims' prior sexual history because the defense failed to establish "a factual predicate from which [the] motive to fabricate can be inferred" because a contrary holding "would make this [motive to fabricate] exception to the [rape-shield] rule limited only by defense counsel's imagination").

Rape Shield—#48

- *State v. Grice*, 123 Ariz. 66, 70 (App.1979) (commenting, "From all that appears in the record, the plot conceived by appellant existed only in the mind of his counsel," because defendant offered no evidence to support theory's factual premise that the rape victim's mother was unaware of her sexual relationship with boyfriend).

- See Outline, pp.45-46 for additional cases.

Rape Shield—#49

Other rationales for preclusion:

- Cross-examination about the victim's sexual history is minimally probative and/or outweighed by the danger of unfair prejudice or distracting the jury. (Outline, pp.46-47.)

- "Reference to prior unchaste acts … injects collateral issues into the case which … divert the jury's attention from the real issues, the guilt or innocence of the accused." *Pope v. Superior Court*, 113 Ariz. 22, 28 (1976). (Outline, pp.47-48.)

- The logical connection between the proffered evidence and the fact the defendant purportedly seeks to establish is weak, non-existent, or downright irrational. (Outline, pp.48-49.)

Rape Shield—#50

- *State v. Oliver*, 158 Ariz. 22, 31-32 (1988) (rejecting claim the victim "had a retaliatory motive" because defendant caught him masturbating: "it is far-fetched to assume that a teenage boy who is embarrassed when caught masturbating will retaliate by drawing attention to the fact that he has been a party to a homosexual relationship").

- *State v. Holley*, 123 Ariz. 382, 385 (App.1979) ("If the girls did not want Mr. Goldstein to find out that they had been having sex by consent, then there was no reason to tell the police anything. The contention of appellant's defense counsel that they told the police they had been raped in order to enhance their reputation so they could be rehired by Goldstein does not even make sense.")

CRUEL & UNUSUAL PUNISHMENT

Cruel & Unusual Punishment #1

Two constitutional provisions apply:

- The Eighth Amendment to U.S. Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
- Article II, Section 15 of the Arizona Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."
- http://www.youtube.com/watch?v=u0lGS0MBwKU Joe (1:49)

Cruel & Unusual Punishment #2

Arizona courts have "accorded identical scope" to the Eighth Amendment and Arizona Constitution Article II, Section 15's prohibition against cruel and unusual punishments. *See State v. Zimmer*, 178 Ariz. 407, 410, 874 P.2d 964, 967 (App.1993).

Cruel & Unusual Punishment #3

- These constitutional provisions prohibit "not only barbaric punishments, but also sentences that are disproportionate to the crime committed." *Solem v. Helm*, 463 U.S. 277, 284 (1983).

- We will focus on the latter protection, as the former applies to sentences for *all* crimes, not just sexual offenses.

Cruel & Unusual Punishment #4

Nor will we be discussing the death penalty. The Supreme Court recently held that the death penalty is disproportionate to the crime of rape of a child in *Kennedy v. Louisiana*, 554 U.S. 407, 441-42 (2008).

Cruel & Unusual Punishment #5

The consequence of the death penalty's categorical unavailability in sex-crime cases, such as for rape of adults or children, is that we need not worry about several unique aspects of the Supreme Court's Eighth Amendment capital-punishment jurisprudence.

Cruel & Unusual Punishment #6

- Capital defendants have the Eighth Amendment right to individualized sentencing in order to ensure that only the worst murderers receive the penultimate penalty.

- Non-*capital* defendants have no such guarantee. Thus, the Legislature may constitutionally mandate a sentence for a crime without giving judges discretion to impose lesser sentences, based upon the particular defendant's unique characteristics or other mitigating circumstances surrounding the charged offense.

Cruel & Unusual Punishment #7

Because sex-crime defendants have no right to individualized sentencing, they cannot establish an Eighth Amendment violation by comparing their sentence against those received by other persons convicted of the same crime.

- *Dog House* (4:44)

http://www.youtube.com/watch?v=eyduncFpzl4

Cruel & Unusual Punishment #8

The sole exception to this general rule is a categorical prohibition barring courts from imposing sentences of life imprisonment without parole eligibility against juveniles.

See Miller v. Alabama, 132 S.Ct. 2455 (2012) (mandatory LWOP sentences for juveniles convicted of murder violate the Eighth Amendment); *Graham v. Florida*, 130 S.Ct. 2011 (2010) (invalidating sentence of life w/out parole imposed against a juvenile convicted of attempted armed robbery and armed burglary).

Cruel & Unusual Punishment #9

Whereas the Supreme Court's *capital* Eighth Amendment jurisprudence requires *strict* proportionality between crime and sentence, more leeway exists in the non-capital context: "A *gross* disproportionality principle is applicable to sentences for terms of years." *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) (emphasis added).

Cruel & Unusual Punishment #10

How did the Court arrive at this gross-disproportionality principle?

To answer this question, we will revisit the winding road of the Supreme Court's non-capital Eighth Amendment's cases decided since 1910.

Cruel & Unusual Punishment #11

Since 1910, the Supreme Court has struck down only two non-capital sentences as disproportionate:

(1) *Weems v. U.S.*, 217 U.S. 349 (1910): 15 years of *cadena temporale* (hard labor in chains) for falsifying public document; and

(2) *Solem v. Helm,* 463 U.S. 277 (1983): striking down a judge's discretionary sentence of life w/out parole for non-violent recidivist whose last crime was writing a "no account check w/ intent to defraud."

N.B. *Graham* invalidated a life sentence w/out parole for juvenile for non-homicide crime under a *categorical* approach. *Miller* scotched LWOP for homicides by juveniles.

Cruel & Unusual Punishment #12

The Supreme Court has upheld **six** non-capital sentences since 1910:

(1) *Graham v. West Virginia*, 224 U.S. 616 (1912): upholding life sentence imposed against three-time horse thief mandated for recidivists.

(2) *Rummel v. Estelle*, 445 U.S. 263 (1980): upholding life w/ parole eligibility for recidivist convicted of three crimes involving theft of property having an aggregate value of $230.

Cruel & Unusual Punishment #13

(3) *Hutto v. Davis*, 454 U.S. 370 (1982): upholding two consecutive prison terms totaling 40 years for possession and distribution of an aggregate of 9 ounces of marijuana.

(4) *Harmelin v. Michigan*, 501 U.S. 957 (1991): upholding statutorily-mandated life imprisonment w/out parole eligibility for possession of 652 grams of cocaine.

Cruel & Unusual Punishment #14

(5) *Ewing v. California*, 538 U.S. 11 (2003): upholding a statutorily-mandated 25-year-to-life sentence for third strike for stealing golf clubs worth $1,200.

(6) *Lockyer v. Andrade*, 538 U.S. 63 (2003): upholding imposition of two statutorily-mandated consecutive 25-to-life sentences for two counts of petty theft that were recidivist's third and fourth strikes under California law.

Cruel & Unusual Punishment #15

Between 1983 and 1991, the Supreme Court required consideration of all three of the following factors in non-capital cases:

"(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; *and* (iii) the sentences imposed for commission of the same crime in other jurisdictions."

Solem v. Helm, 463 U.S. 277, 292 (1983).

Cruel & Unusual Punishment #16

The Supreme Court's *Harmelin* decision transformed the *Solem* standard in two significant ways:

First, the first prong of the *Solem* standard now requires proof of *gross* disproportionality—*strict* proportionality is not the standard.

Cruel & Unusual Punishment #17

Second, if the defendant cannot make the threshold showing that his sentence is grossly disproportionate to his crime, *Harmelin* requires the reviewing court to end its analysis and uphold the sentence. The judge may proceed to the intra- and extra-jurisdictional comparative analyses (*Solem's* second and third prongs) only if the defendant satisfies the threshold test.

Cruel & Unusual Punishment #18

Justice Kennedy's landmark opinion in *Harmelin* distilled the prevailing gross-disproportionality principle from four other concepts recurrently mentioned in the Court's conflicting Eighth Amendment decisions:

(1) the legislature's primacy in fixing punishment to cure societal ills;

(2) the variety of penological theories;

(3) federalism naturally produces diverging sentences, with one state always bearing the distinction of having the Nation's most severe punishment; and

(4) the need for "objective factors to the maximum extent."

Cruel & Unusual Punishment #19

The practical effect of *Harmelin* is that the defendant cannot establish that his sentence is grossly disproportionate to his crime by jumping to the third part of the standard and showing that Arizona's prescribed sentence for his offense ranks as the Nation's most severe.

Cruel & Unusual Punishment #20

What is the unit of an Eighth Amendment claim—the aggregate total of consecutive terms or the duration of each component prison term?

Answer: “Eighth amendment analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence.” Thus, “if the sentence for a particular offense is not disproportionately long, it does not become so merely because it is consecutive to another sentence for a separate offense or because the consecutive sentences are lengthy in the aggregate” and/or exceed his life expectancy.

Cruel & Unusual Punishment #21

Additionally, defendants have no constitutional right to concurrent sentences for multiple crimes.

Upshot: Defendants cannot successfully establish Eighth Amendment violations by focusing upon the cumulative length of their consecutive prison terms and complaining that the aggregate total exceeds a person's natural life span.

Cruel & Unusual Punishment #22

The *mandatory* nature of lengthy consecutive prison terms does not render them unconstitutional: "Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history." *Harmelin v. Michigan*, 501 U.S. 957, 994-95 (1991) .

"Even a mandatory *life* sentence passes constitutional muster." *United States v. Khan*, 461 F.3d 477, 495 (4th Cir. 2006) (Emphasis in original).

Cruel & Unusual Punishment #23

Arizona's *post-Harmelin* jurisprudence.

State v. Bartlett, 164 Ariz. 229, 792 P.2d 692 (1990) ("*Bartlett I"),* found unconstitutional two flat, consecutive, mandatory sentences totaling 40 years for an immature 23-year-old defendant's two acts of consensual sex with two girls who were under 15.

The Supreme Court vacated *Bartlett I* and remanded the case in light of *Harmelin*. *See Arizona v. Bartlett*, 501 U.S. 1246 (1991).

Cruel & Unusual Punishment #24

State v. Bartlett ("Bartlett II"), 171 Ariz. 302, 830 P.2d 823 (1992), was a 3-2 decision that reaffirmed the original holding these sentences were unconstitutional because the acts were non-violent and consensual, the defendant had no prior criminal history and was immature, underage sexual activity was commonplace, and societal standards had changed.

The majority opinion (C.J. Feldman) declared that "the question of 'gross disproportion' cannot be resolved without considering all of the factors that aggravate or mitigate the crime" and therefore required consideration of "the facts of the crime and the criminal."

Cruel & Unusual Punishment #25

Just 4 years later, the Arizona Supreme Court, in another 3-2 decision, overruled *Bartlett II* by holding that "the initial threshold disproportionality analysis is to be measured by the nature of the offense generally and not specifically." *State v. DePiano*, 187 Ariz. 27, 30, 926 P.2d 494, 497 (1996).

Cruel & Unusual Punishment #26

Just 7 years later, the Arizona Supreme Court overruled *DePiano* and held that reviewing courts must analyze "the specific facts and circumstances of the offenses when determining if a sentence is grossly disproportionate to the crime committed." *State v. Davis*, 206 Ariz. 377, 384, ¶ 32, 79 P.3d 64, 71 (2003).

Davis struck down consecutive 13-year prison terms imposed upon an immature 20-year-old defendant who stood convicted of three counts of sexual conduct with a minor for having non-coerced sex with two post-pubescent teenage girls who initiated sexual activity.

Cruel & Unusual Punishment #27

Just 3 years later, the Arizona Supreme Court distinguished *Davis* by rejecting an Eighth Amendment challenge to the imposition of 20 statutorily-mandated, consecutive 10-year prison terms against a defendant who stood convicted of 20 counts of sexual exploitation of a minor for possessing graphic images of child pornography. *State v. Berger*, 212 Ariz. 473, 480-82, ¶¶ 37-49, 134 P.3d 378, 385-87 (2006).

Cruel & Unusual Punishment #28

The *Berger* court endeavored to resolve the tension between:

(1) Davis' case-specific focus on the offender's subjective culpability and the circumstances of the offense for which he was convicted; and

(2) *Harmelin's* declaration that the controlling gross-disproportionality principle is itself informed by four objective factors—the primacy of the legislature, the variety of legitimate penological schemes, the nature of a federalist system, and the requirement that proportionality review be guided by *objective factors to the maximum extent possible*.

Cruel & Unusual Punishment #29

Sidestepping the *Bartlett II-DePiano-Davis* merry-go-round, the Arizona Supreme Court articulated the following two part test for assessing whether an inference of gross disproportionality exists between a statutorily mandated sentence and the defendant's crime of conviction.

Cruel & Unusual Punishment #30

Step one is the rational basis test:

"A court must *first* determine whether the legislature 'has a reasonable basis for believing that [a sentencing scheme] 'advance[s] the goals of [its] criminal justice system in any substantial way.'"

State v. Berger, 212 Ariz. 473, 477, ¶ 17 (2006) (quoting *Ewing v. California*, 538 U.S. 11, 28 (2003) (quoting *Solem v. Helm*, 463 U.S. 277, 297 n.22 (1983)) (alterations in original).

Cruel & Unusual Punishment #32

The threshold analysis' second step is defendant-specific (subjective): "In light of that conclusion, the court *then* considers if *the sentence of the particular defendant* is grossly disproportionate to the crime he committed. … A prison sentence is not grossly disproportionate, and a court need not proceed beyond the threshold inquiry, if it arguably furthers the State's penological goals and thus reflects 'a rational legislative judgment, entitled to deference.'"

State v. Berger, 212 Ariz. 473, 477, ¶ 17 (2006) (emphasis added) (quoting *Ewing v. California*, 538 U.S. 11, 30 (2003)).

Cruel & Unusual Punishment #33

Rational basis test's *pre-Berger* antecedents:

Ewing v. California, 538 U.S. 11, 30 (2003) (upholding California's three-strikes statute because "it reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated") (emphasis added).

Harmelin v. Michigan, 501 U.S. 957, 1003-04 (1991) (Kennedy, J., concurring) (noting that the Michigan legislature had a "rational basis" for mandating natural life sentences for possession of more than 500 grams of cocaine).

Bill Cosby: http://www.youtube.com/watch?v=vWzceMfsRbU

Cruel & Unusual Punishment #34

Arizona's *pre-Berger* rational-basis antecedents.

State v. Crego, 154 Ariz. 278, 281, 742 P.2d 289, 292 (App.1986) ("It is sufficient that there is *a rational basis* for concluding that the sentences will help achieve a desired social objective.") (emphasis added) (quoting *State v. Carson*, 149 Ariz. 587, 588, 720 P.2d 972, 973 (App.1986)).

Post-Berger decisions acknowledge the "rational basis" test. *See State v. Russo*, 219 Ariz. 223, 227, ¶ 12, 196 P.3d 826, 830 (App.2008) (upholding fine based on "rational basis" for fining DUI offenders).

Cruel & Unusual Punishment #35

Stage one's rational-basis analysis requires the State to identify the penological objectives the Legislature sought to achieve when it mandated the challenged sentencing scheme.

You are NOT limited to explicit statements of legislative intent: the purposes of the challenged law may be surmised. *See State v. Wagstaff*, 164 Ariz. 485, 490-91 (1990); *State v. Hammonds*, 192 Ariz. 528, 531-32 (App.1998) (collecting cases).

Cruel & Unusual Punishment #36

The objectives of the lengthy consecutive prison terms mandated by the Dangerous Crimes Against Children Act include:

(1) Retribution (punishment);

(2) Deterrence (general and specific);

(3) Incapacitation of pedophiles to protect other children.

Sources: *Berger*, *Williams*, *Wagstaff*, *Tsinnijinnie*, and *Boynton.*

Cruel & Unusual Punishment #37

Berger identified several additional legislative objectives for mandating that possession of each image be punished with a consecutive prison term of at least 10 years:

(1) Drying up the demand for child pornography, which fuels the sexual victimization of children during the production phase.

(2) Encouraging consumers to destroy their CP collections, which in turn (a) reduces the likelihood these images will inflame their desires to commit hands-on offenses; (b) deprives them of seduction tools; and (c) ends the violation of the child's privacy.

Cruel & Unusual Punishment #38

Mandating stiff penalties for crimes against children constitutes a rational means of attempting to accomplish these goals, especially because the likelihood of detection is small, and the harm inflicted upon the child specifically and society at large is particularly grievous.

Note that the State need not prove that the means chosen by the Legislature are most narrowly tailored to achieve these goals. A legislative enactment challenged under the rational basis test will pass constitutional muster unless it is proved beyond a reasonable doubt to be wholly unrelated to any legitimate legislative goal.

Cruel & Unusual Punishment #39

The *subjective* component of *Berger's* threshold gross-disproportionality analysis requires consideration of the specific offender and the crime's circumstances for only two limited purposes:

(1) To determine whether the Legislature enacted the sentencing statute at issue with the defendant's alleged conduct in mind—does the defendant fall within the core of the statutory prohibition, or has he been caught up in the broad sweep of the statute?

Cruel & Unusual Punishment #40

AND

(2) To ascertain "the defendant's degree of culpability for the offense" by determining whether he "consciously sought to do exactly that which the legislature sought to deter and punish," not whether "the defendant is, apart from the crime at issue, a good person or a promising prospect for rehabilitation."

State v. Berger, 212 Ariz. 473, 481-82, ¶¶ 39-47, 134 P.3d 378, 386-87 (2006).

Cruel & Unusual Punishment #41

If the defendant's conduct rests "at the core, not the periphery, of the prohibitions of the [statute at issue]," the reviewing court must defer to the legislature and uphold the statutorily-mandated penalty.

Conversely, if the "objective factors about the offenses indicated that the defendant's conduct was at the edge of the statute's broad sweep of criminal liability," then the statutorily-mandated sentence is entitled to less deference, especially when the reviewing court "[can]not reconcile the particular sentences imposed with any reasonable sentencing policy it could attribute to the legislature."

Cruel & Unusual Punishment #42

The Supreme Court upheld 20 consecutive 10-year prison terms in *Berger* because:

(1) Berger's conduct fell within the core of A.R.S. § 13-3553's prohibition against *knowingly possessing visual depictions of sexual conduct involving minors;* AND

(2) Berger had a high degree of culpability, as he was a mature 52-year-old HS teacher and had consciously sought to do what the Legislature sought to deter and punish by collecting thousands of CP images for 6 years.

Cruel & Unusual Punishment #43

Davis' conduct fell at the edge of the broad sweep of the statute because:

"Davis was twenty years old and his maturity and intelligence fell far below that of a normal adult."

"The girls involved not only participated willingly, but they had sought Davis out and gone voluntarily to his home."

"If the girls had been fifteen or older and Davis within two years of their age, he would not have been criminally liable at all. A.R.S. § 13–1407(F)."

Cruel & Unusual Punishment #44

Once the defendant succeeds in raising the inference of gross-disproportionality, you need to proceed to intra- and inter-jurisdictional comparative analysis.

While citing statutes prescribing equal or greater sentences for crimes of equal or lesser gravity, remind the court that “precise calibration of crime and punishment” is not required by the Eighth Amendment. *United States v. Polk*, 546 F.3d 74, 76 (1st Cir. 2008).

Cruel & Unusual Punishment #45

State v. Mulalley, 127 Ariz. 92, 97 (1980), will help blunt seeming disparities in intra-jurisdictional comparative analysis:

> Disproportionality is, of course, a question of degree. The choice of fitting and proper penalties is not an exact science, but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public will; in appropriate cases, some leeway for experimentation may also be permissible. The judiciary, accordingly, should not interfere in this process unless a statute prescribes a penalty 'out of all proportion to the offense.'"

Cruel & Unusual Punishment #46

Because Arizona ranks at or near the top of the sentencing range for sex crimes, remind the court that "some State will always bear the distinction of treating particular offenders more severely than any other State." *Rummel v. Estelle*, 445 U.S. 263, 282 (1980).

See Cases on pp.23-24 of outline.

Cruel & Unusual Punishment #47

Inter-jurisdictional comparative analysis:

See Outline's pages 24-27 for citations to other state statutes punishing simple possession of child pornography.

See Outline's pages 27-28 n.4 for cases involving sexual offenses involving children under 12 years of age.

Cruel & Unusual Punishment #48

Pointers for Eighth Amendment litigation:

(1) Remind the court that crimes against children are among the most egregious offenses, and that protecting children is a paramount state interest. See pp.28-29 of Outline for Arizona, federal, and sister-state cases.

Cruel & Unusual Punishment #49

Pointer #2: You should identify the purposes and objectives that motivated the legislature to prescribe the mandatory sentencing provisions and then explain how the imposition of the challenged sentence in the defendant's case reasonably furthers these goals.

Cruel & Unusual Punishment #50

Pointer #3: Give the court a good frame of reference by citing Supreme Court cases and other precedent that have upheld stiff sentences imposed for crimes of equal or lesser gravity. See Outline pp.29-30.

Cruel & Unusual Punishment #51

Pointer #4: Because the Eighth Amendment grants greater leeway to impose severe sentences against recidivists, every effort should be made to highlight the fact that the defendant committed other crimes, even if they did not result in conviction or were non-sexual. See Outline p.30.

The fact that the defendant has no prior criminal history, however, does not render his sentence unconstitutional. See Outline pp.30-31 for federal and Arizona cases.

Cruel & Unusual Punishment #52

Pointer #5: In the gross-disproportionality analysis, you can blunt the defendant's attempts to minimize his moral culpability by demonstrating that:

- his offense was committed against a person and was not a property crime; or
- his misconduct was intentional and deliberate, as opposed to reckless or negligent; or

Cruel & Unusual Punishment #53

- the defendant was not immature or of below-average intelligence ; or
- the defendant had a parental or quasi-parental relationship with the victim; or
- the defendant was much older than his child victims; or
- the victim did not initiate sexual contact with the defendant.

Cruel & Unusual Punishment #54

How to show the court that a child-pornography defendant falls at the core, not the periphery, of the statutory prohibition:

- Reveal the extent to which the defendant's collection of contraband surpassed the number of charged images. (Berger had collected thousands of uncharged images.)

- Show how many "hits" for the most common pedophilic search terms the forensic investigator found on the defendant's computer or storage media.

- Show the length of time during which the defendant downloaded/collected child pornography. (Berger—6+ yrs.)

Cruel & Unusual Punishment #55

Tips in child-pornography cases (core vs. periphery), continued:

- Describe the types of activities depicted in the defendant's child pornography (intercourse, rape, bestiality, etc.).

- Give the ages of the children depicted and their sexual partners.

- Report whether the defendant attempted to have sex with minors or had a history of sexual conduct with minors, and/or whether the defendant used child pornography to groom potential victims.

Cruel & Unusual Punishment #56

Core or periphery of A.R.S. §13-3553?

http://www.youtube.com/watch?v=4PLvdmifDSk (Jurassic Park, 1:45)

Scenario: Defendant secretly videotapes his mildly retarded post-pubescent step-daughter undressing and bathing without her knowledge for 5 years for his own private viewing. Videotape found during her adulthood. Note that Section 13-1424 prohibits voyeurism.

Cruel & Unusual Punishment #57

- Core or periphery of A.R.S. §13-3553?

Scenario: Defendant draws police attention by sending girl in Florida (undercover cop) a video of a young girl showering and invites her to meet for sex. Police execute SW and find 6 sheets of paper depicting 100 thumbnail CP images downloaded from Internet. Ten of these printed images are basis for sexual-exploitation charges, but no evidence offered regarding forensic exam of computer media.

Cruel & Unusual Punishment #58

N.B. Berger left open result if defendants "come into possession of these images fleetingly or inadvertently." 212 Ariz. 473, 480, ¶ 35, 134 P.3d 378, 385 (2006). *See also State v. Taylor*, 160 Ariz. 415, 420, 773 P.2d 974, 979 (1989) ("Our conclusion might be different if Taylor had acquired all of the photographs at the same time in one book from someone else.").

Cruel & Unusual Punishment #59

- Core or periphery of A.R.S. §13-3553?

Scenario: Defendant purchases from European publishers magazines of child pornography in 1970s before USA banned CP. Defendant moves his huge collection of graphic CP from California to a friend's Arizona home for free storage and never returns. Two years later, the friend finds the collection and calls the police.

Cruel & Unusual Punishment #60

- Core or periphery of A.R.S. §13-3553?

Scenario: Defendant molests girlfriend's daughter while she sits on his lap at computer desk where they view child pornography together. Collection is 100 CP images in cache.

Cruel & Unusual Punishment #61

Hands-on offenses against children:

(1) Emphasize the age differential if significant;
(2) Detail the extent of intimacy with the victim;
(3) Highlight the duration of the sexual relationship;
(4) Indicate whether the defendant had a sexual history with other minors;
(5) Report whether the defendant infected the victim with a STD, impregnated her, or influenced the victim to abuse other children in the same way as the defendant abused him/her;
(6) Report the defendant's threats/violence against the victim or loved ones; and
(7) Recite the defendant's criminal history of any kind.

Cruel & Unusual Punishment #62

A.R.S. § 13-701(C) allows the sentencing judge to consider "any evidence or information introduced or submitted to the court or the trier of fact before sentencing or any evidence presented at trial." The State has many avenues for making this information part of the record, including:

- Responses to motions for release (Berger);

- Motions to admit uncharged act evidence under Rules 404(b) and 404(c);

Cruel & Unusual Punishment #63

- Litigation on Suppression Motions—search warrant affidavits or confessions might reference the defendant's uncharged sexual offenses (Royalty).

- Settlement conferences;

- State's sentencing memoranda (include police reports, witness interviews, prior convictions, and any other documentation); and

- Evidence offered at an aggravation/mitigation hearing.

Cruel & Unusual Punishment #64

If the defendant arguably falls at the periphery of the statutory prohibition, what are your options?

(1) See if other statutes prohibit the same conduct—basis for alternative charge or a plea offer to the lesser offense (i.e., voyeurism or attempt);

(2) Plead the defendant to a probation-eligible offense. If he violates probation, he might demonstrate the danger he poses to society and place himself at the core;

(3) Develop the record to show he falls at the core of the statute

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